Petition

81-225

No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

BLUE SHIELD OF VIRGINIA,
BLUE SHIELD OF SOUTHWESTERN VIRGINIA
and
NEUROPSYCHIATRIC SOCIETY OF VIRGINIA, INC.,
Petitioners,

v.

CAROL MCCREADY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a subscriber to a prepaid health care plan, purchased by her employer in an unrestrained insurance market, has standing under § 4 of the Clayton Act to complain that the plan is boycotting clinical psychologists by failing to cover their services?

2. Whether the term of a health insurance contract that limits coverage to services performed by physicians is exempt from the antitrust laws as part of the "business of insurance" within the meaning of § 2 of the McCarran-Ferguson Act, where plaintiff does not allege a "boycott" within the meaning of § 3(b) of the McCarran-Ferguson Act?

PARTIES

The caption of this Petition contains the names of all parties to this action in the Fourth Circuit. One defendant, Medical Service of the District of Columbia, Inc., was dismissed by the district court and was not a party in the Fourth Circuit. Neither Blue Shield of Virginia, nor the Neuropsychiatric Society of Virginia, Inc., has any parent, subsidiary or affiliated companies other than wholly-owned subsidiaries. Blue Shield of Southwestern Virginia owns fifty percent of the outstanding shares of stock of Cardinal Agency, Inc., the remaining shares being owned by Blue Cross of Southwestern Virginia.

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and

NEUROPSYCHIATRIC SOCIETY OF VIRGINIA, INC.,
Petitioners,

v.

CAROL MCCREADY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Blue Shield of Virginia (the "Richmond Plan"), Blue Shield of Southwestern Virginia (the "Roanoke Plan") and the Neuropsychiatric Society of Virginia, Inc. ("NSV"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The unreported opinion of the United States District Court for the Eastern District of Virginia, which was

entered on October 10, 1978, is attached to this Petition as Appendix A. The opinion of the United States Court of Appeals for the Fourth Circuit, attached as Appendix B, is reported at —— F.2d ——, No. 78-1883 (4th Cir., May 12, 1981).

JURISDICTION

The judgment of the Fourth Circuit was entered on May 12, 1981. A timely petition for rehearing and suggestion for rehearing *in banc* was filed on May 26, 1981, and was denied by the Fourth Circuit in an order dated July 2, 1981, attached as Appendix C. On July 7, 1981, the Plans moved the Fourth Circuit for a stay pending the filing of this Petition for writ of certiorari. The Fourth Circuit granted the motion and stayed its mandate for a period of thirty days in an order dated July 8, 1981, attached as Appendix D. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1966).

STATUTES INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 15 (Supp. 1981), provides in relevant part as follows:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Sections 2 and 3(b) of the McCarran-Ferguson Act, 15 U.S.C. §§ 1012 and 1013(b) (1976), are set forth in Appendix E.

STATEMENT OF THE CASE

(a) Parties:

Respondent Carol McCready ("McCready") brought this antitrust action in the United States District Court for

the Eastern District of Virginia in July 1978, and alleged that the Plans and NSV had conspired "t. :lude clinical psychologists from receiving compensat.. under [the Plans'] prepaid health care plans in violation of Section 1 of the Sherman Act." [1] McCready claims to represent a class, pursuant to Fed.R.Civ.P. 23, of those persons in Virginia who were subscribers to the Plans and who incurred costs for treatment by clinical psychologists since 1973. On behalf of this class, McCready seeks damages of three times the costs incurred for such treatment (which was not covered by the Plans' contracts), plus attorneys' fees. No ruling has yet been made on the certification of the class McCready claims to represent.

The Plans are nonprofit, nonstock Virginia corporations organized under special enabling legislation that authorizes "[a] group of physicians" to conduct "a plan or plans for furnishing prepaid medical . . . services." [2] The Plans, like Blue Shield plans nationwide, contract with their subscribers, or with employers, to provide prepaid medical treatment. Commercial health insurance companies, in contrast, generally pay only a fixed fee for any given treatment, which may or may not cover the full cost of that treatment.

The Plans are subject to extensive and detailed regulation by the Bureau of Insurance of the Virginia State Corporation Commission (the "SCC"). By statute the SCC assigns each Plan a specific territory, and each Plan is prohibited from selling coverage to persons who do not live or work in its territory.[3] Thus, by statute the Plans cannot compete with each other, but each Plan is in direct competition with the hundreds of commercial health insurers doing business in Virginia.

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[1] Appendix B, at 15a.

[2] Virginia Code § 38.1-811.

[3] *Id.* § 38.1-822.1.

NSV is a nonstock, nonprofit Virginia corporation and is the professional association of psychiatrists in Virginia.

(b) The Allegations in McCready's Complaint:

The precise allegations in McCready's complaint are critical to the issues of law presented in this case. McCready alleged that the "substantial terms" of the conspiracy among the Plans and NSV were as follows:

> [T]o exclude and boycott clinical psychologists from receiving compensation under prepaid health care plans in connection with the furnishing of psychological services including psychotherapy to subscribers to [the] plans.[4]

The conspiracy alleged by McCready, therefore, was a conspiracy among the Plans and NSV to boycott clinical psychologists, *not* to boycott or injure McCready or other subscribers.

There is no allegation in the complaint that McCready was unaware of the terms of the group contract under which she was a participant at the time she elected to be treated by a clinical psychologist.[5] Moreover, there is no allegation in the complaint that the alleged boycott increased the price of clinical psychologists' services or that the alleged boycott hindered McCready in finding a clinical psychologist to treat her. Finally, and most importantly, there is no allegation in the complaint of any restraint of trade in the market for health insurance. Indeed, the district court noted that "[t]here is no suggestion that [McCready] cannot obtain insurance coverage for psychological treatment from insurance carriers other than [the Plans]."[6]

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[4] Complaint, ¶ 25.

[5] In fact, in her deposition McCready admitted that she knew that the terms of the group contract did not cover the services of psychologists. McCready deposition, at 26-27 (Oct. 3, 1978).

[6] Appendix A, at 6a n. 8.

(c) Facts:

From August 1975 through December 1977, McCready was an employee of Prince William County, Virginia. Prince William County provided its employees with a group subscriber contract purchased from the Richmond Plan. This contract by its terms covered only "medically necessary services performed or prescribed . . . by a Physician." Health insurance policies that were not restricted to physicians' services were readily available in the market. As the district court found, the health insurance market was completely "unrestrained." [7]

While an employee of Prince William County, McCready submitted claims to the Richmond Plan for the services of a clinical psychologist. Since these services were not performed or supervised by a physician, these services were not covered by the group subscriber contract purchased by Prince William County. For this reason, the Richmond Plan denied the claims.

The sole "injury" alleged by McCready is that she was not reimbursed by the Richmond Plan for the cost of her visits to clinical psychologists.[8] It is absolutely clear that this injury was caused by the independent decision of her employer in selecting, in an unrestrained market, a group subscriber contract that did not provide the benefits McCready desired, and by her own decision to use noncovered services.[9]

(d) Decisions Below:

In the district court, the Plans and NSV moved to dismiss McCready's complaint under Fed.R.Civ.P. 12(b)(6) on the ground that McCready lacked standing under § 4

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[7] Appendix A, at 6a.

[8] Complaint, ¶ 28.

[9] *Cf. Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977).

of the Clayton Act to assert the antitrust claim alleged in her complaint. The district court, Judge Albert V. Bryan, Jr., granted the motion, dismissed the complaint, and held that McCready did not have standing because she was not in the "target area" of the alleged violation:

> [McCready's] standing depends upon *whether her injury was suffered within the sector of the economy competitively endangered by the defendants' alleged violations of the antitrust laws.* . . . [Psychologists] are the ones allegedly being boycotted, not [McCready] . . . [McCready] may have suffered an injury by being unable to collect insurance from one of the defendants, but this injury is too indirect and remote to be considered "antitrust injury". . . . While standing and antitrust injury may or may not be treated as the same issue, in this case [McCready] does not have the former because she has not sustained the latter. Accordingly, her complaint must be dismissed.[10]

On appeal, a divided Panel of the Fourth Circuit reversed. The Panel's opinion was written by Judge Thomsen, Senior District Judge for the District of Maryland, sitting by designation, and was joined by Judge Butzner. Judge Widener dissented.

The majority of the Panel conceded that McCready's complaint alleged a conspiracy directed not at her, but at clinical psychologists.[11] Nonetheless, according to the majority, McCready has standing under § 4 of the Clayton Act. The majority announced the following test for antitrust standing:

> [Section 4 of the Clayton Act] encompasses "any person" whose property loss is directly or proximately caused by violation of the law. McCready satisfies these requirements. Her injury was imme-

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[10] Appendix A, at 5a-6a (emphasis added).

[11] Appendix B, at 19a.

> diate and direct. Although denial of reimbursement was designed to divert her and other subscribers from psychologists to psychiatrists, this goal does not make her loss too remote or indirect to be covered by [§ 4 of the Clayton] Act.[12]

The majority went on to describe the long-established "target area" rule for antitrust standing as mere "catch words."[13] The majority's only stated reasons for disregarding the established "target area" rule were that McCready's damages can be "readily ascertained" and that there would be no "double recovery."[14] Neither of these reasons can bear scrutiny. The relative ease of calculating damages is irrelevant to standing under § 4 of the Clayton Act. Plaintiffs who clearly have standing may nonetheless have damages that are unduly speculative and thus impossible to prove,[15] while others, such as landlords and creditors of the target of an antitrust violation, lack standing but suffer damages that are easily measurable.[16] Furthermore the majority did not consider the practical need to avoid a "myriad" of treble damage actions, which is a primary concern underlying the "target area" rule.[17]

In his well-reasoned dissent, Judge Widener pointed out that the "target area" rule, which was rejected by

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[12] Appendix B, at 19a-20a.

[13] Appendix B, at 20a.

[14] *Id.*

[15] *E.g.*, *Knutson* v. *Daily Review, Inc.*, 479 F. Supp. 1263 (N.D.Cal. 1979).

[16] *E.g.*, *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972) (landlord); *Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975) (creditor).

[17] *Pan-Islamic Trade Corp.* v. *Exxon Corp.*, 632 F.2d 539, 546 (5th Cir. 1980).

the majority, restricts antitrust standing to plaintiffs at whom an antitrust violation is directed. Under this rule, according to Judge Widener, McCready would lack antitrust standing, because "even [she] does not describe her injury as a design or goal of any antitrust violation, rather as a consequence thereof." [18] Judge Widener explained his reasoning as follows:

> I *would hold that plaintiff does not satisfy the requirement of § 4 that she be injured "by reason of" a violation of the antitrust laws.* She does not claim that the actions of the Blue Shield defendants were aimed at injuring any group beyond the psychologists. The psychologists make up the group within the sector of the economy in which the illegal conduct of the Blue Shield defendants threatens to break down competitive conditions. Any injury to Miss McCready is too indirect and consequential to be actionable under § 4 of the Clayton Act. *As the district court said, she operated in a market which was unrestrained so far as she was concerned.*[19]

The Plans and NSV submit that Judge Widener's reasoning is correct, and that the opinion of the majority is erroneous.

On July 7, 1981, the Plans moved the Fourth Circuit for a stay of its mandate pending the filing of this Petition for certiorari, and on July 8, 1981, the Fourth Circuit issued the requested stay.[20]

(e) Related Litigation:

On the same day McCready filed her complaint in this case, a similar complaint was filed in the same court

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[18] Appendix B, at 22a.

[19] Appendix B, at 26a (emphasis added).

[20] The order of the Fourth Circuit granting the stay is Appendix D to this Petition.

against the same defendants by the Virginia Academy of Clinical Psychologists ("VACP") and its president, Robert J. Resnick ("Resnick"). The material allegations in the two complaints are identical. After trial, the district court entered judgment for the Plans and NSV. The Fourth Circuit reversed as to the Plans.[21] This Court denied certiorari.

In the *VACP* litigation, Resnick, a clinical psychologist, is challenging the same antitrust violation that McCready alleges in her complaint. Resnick, unlike McCready, is directly affected by the alleged boycott. Thus, the policies of the antitrust laws can be fully vindicated by those directly affected. Furthermore, this case presents exactly the situation of multiple lawsuits against the same defendants that the "target area" rule was designed to prevent.

REASONS FOR GRANTING THE WRIT

The decision of the Fourth Circuit below is in conflict with the decisions of the Second and the Fifth Circuits, as well as other circuits. Also, the decision of the Fourth Circuit is contrary to the principles announced in this Court's recent decisions under § 4 of the Clayton Act. This Court has never squarely decided what standing is required under § 4 of the Clayton Act, and this case, which comes to this Court on a dismissal under Fed.R. Civ.P. 12(b)(6), presents an opportunity to decide this important issue as a matter of law. Finally, the McCarran-Ferguson Act issue in this case raises an impor-

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[21] *Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980), *cert. denied*, —— U.S. ——, 67 L.Ed.2d 342 (1981). The Fourth Circuit affirmed the dismissal of NSV.

tant question regarding the application of the antitrust laws to insurance contracts.

(a) The Decision of the Fourth Circuit Conflicts with Decisions of the Second and Fifth Circuits, as Well as Other Circuits

Rule 17.1(a) of the Rules of this Court provides that one consideration in favor of granting the writ of certiorari is that the decision of the court below is "in conflict with the decision of another federal court of appeals on the same matter." The decision of the Fourth Circuit here is in direct conflict with the decisions of the Second [22] and Fifth [23] Circuits, as well as other circuits.[24]

It has been settled in these decisions that standing to assert antitrust claims rests on the following test:

1. The injury alleged must be directly or proximately caused by violation of the antitrust laws; and
2. The antitrust plaintiff must be within the "target area" of the antitrust violation.

The majority opinion in the Fourth Circuit purported to apply the first element of this test, but rejected the sec-

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[22] *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

[23] *Associated Radio Service Co.* v. *Page Airways, Inc.*, 624 F.2d 1342, 1362 (5th Cir. 1980), *cert. denied*, —— U.S. ——, 68 L.Ed.2d 226 (1981); *Pan-Islamic Trade Corp.* v. *Exxon Corp.*, 632 F.2d 539, 546 (5th Cir. 1980); *Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir. 1975); *McDonald* v. *St. Joseph's Hospital of Atlanta, Inc.*, No. 80-1295 (N.D.Ga. June 10, 1981) (following *Jeffrey*).

[24] *See* notes 32-35 *infra*.

ond. It is the rejection of the second element, the so-called "target area" rule, that brings the Fourth Circuit into conflict with other circuits. In this respect, the majority opinion is the most recent, and most extreme, of circuit court decisions that have abandoned the established "target area" rule and adopted instead an unworkable *ad hoc* analysis for standing under § 4 of the Clayton Act.[25]

Thus, the Fourth Circuit's holding, if applied to the facts in *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*,[26] would reverse the result reached by the Second Circuit in that case. *Calderone* is perhaps the leading circuit court decision on standing under § 4 of the Clayton Act. In that case, the landlord of a movie theatre sued distributors of motion pictures under § 4 of the Clayton Act. The lease payments for the movie theatre included a percentage of the theatre's gross receipts. The landlord claimed that antitrust violations by the distributors had reduced the theatre's receipts, and that, in consequence, the landlord had suffered injury within the meaning of § 4 of the Clayton Act.

The Second Circuit disagreed and held that the landlord did not have standing under § 4 of the Clayton Act:

> In a series of decisions over the last 15 years, in all of which certiorari was denied by the Supreme Court, this court has committed itself to the principle that in order to have "standing" to sue for treble damages under § 4 of the Clayton Act, a person must be within the "target area" of the alleged antitrust conspiracy, *i.e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued.* Accordingly we have drawn a line *excluding those who have suffered eco-*

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[25] *See* notes 36-38 *infra*.

[26] 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

> *nomic damage by virtue of their relationships with "targets" or with participants in an alleged antitrust conspiracy, rather than by being "targets" themselves.*[27]

McCready also claims injury solely as a result of her relationship with the targets of an alleged antitrust conspiracy. Thus, the holding of the Fourth Circuit here would, applied to *Calderone*, give the opposite result: since the landlord received less money as rent for the theatre, and this reduction of rent was "caused" in the simple, physical sense by an antitrust violation, the Fourth Circuit would hold that the landlord had standing under § 4 of the Clayton Act.

This same reversal of result, which is the sharpest test for a true conflict, would also occur if the Fifth Circuit's decision in *Pan-Islamic Trade Corp.* v. *Exxon Corp.*[28] had been decided under the rule adopted by the Fourth Circuit here. In *Exxon Corp.*, an oil broker sought to amend its complaint against sixteen oil companies to assert an antitrust claim under § 4 of the Clayton Act. The broker claimed that it had been unable to resell Algerian crude oil because of a conspiracy by the oil companies to boycott Algerian crude oil. Thus, the broker, like McCready here, alleged a boycott directed not at the broker, but rather at one from whom the broker purchased.

The Fifth Circuit affirmed the district court's refusal to allow the amendment on the ground that the broker was not within the "target area" of the alleged antitrust violations. The Fifth Circuit noted that the broker "does not allege that it is a competitor in any of the five areas of the oil industry for which it alleges anti-

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[27] 454 F.2d at 1295 (emphasis added).

[28] 632 F.2d 539, 546-47 (5th Cir. 1980).

trust violations, or that it intends to enter these areas." [29] The broker did allege, however, that the antitrust violations had caused it injury by preventing it from reselling crude oil.[30] Nonetheless, the Fifth Circuit denied the broker standing under § 4 of the Clayton Act, and wrote as follows:

> An important rationale for [the "target area" rule] is to prevent an antitrust defendant from being subjected to a myriad of treble-damage suits *by all those in any way affected by an antitrust violation.*[31]

Again, application of the Fourth Circuit's novel rule to *Exxon Corp.* would result in a holding that the broker has standing, merely because the broker alleged injury "caused by" an antitrust violation.

Other circuits, including the First,[32] Eighth,[33] Ninth [34]

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[29] *Id.* at 547.

[30] *Id.* at 545.

[31] *Id.* at 547 (emphasis added). The Court cited seven cases supporting its conclusion, including *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 262 n. 14 (1972).

[32] In *Engine Specialties, Inc.* v. *Bombardier, Ltd.*, 605 F.2d 1, 17-19 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980), the court denied standing to two distributors who asserted antitrust claims against a competitor of the manufacturer from whom the distributors purchased. The court conceded that the distributors had suffered "economic injury," but reasoned as follows:

> Recovery of treble damages is potent ammunition intended not only to protect the aggrieved, but to deter the wrongdoer. The courts have attempted to keep the range of the barrage *within the target area* thought to have been intended by Congress in passing the antitrust legislation.

605 F.2d at 17 (emphasis added).

[33] *Sanitary Milk Producers* v. *Bergjans Farm Dairy, Inc.*, 368 F.2d 679, 688-89 (8th Cir. 1966) (Blackmun, J.).

[34] *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 126-30 (9th Cir.), *cert. denied sub nom., Morgan* v. *Automobile Mfrs.*

and Tenth [35] Circuits, have adopted and followed the "target area" rule. In contrast, the Third Circuit apparently relies on a case-by-case analysis without following a specific rule; [36] and the Sixth Circuit has applied an inappropriate "zone of interest" test borrowed from administrative law.[37] The law in the Seventh Circuit and the District of Columbia Circuit is unclear.[38] Thus, the standard applied for standing under § 4 of the Clayton Act varies from circuit to circuit, and plaintiffs have standing or not based on the happenstance of venue, and not as a result of uniform considerations of antitrust policy.

The rule adopted by the Fourth Circuit in this case is unworkable and is essentially no rule at all. The

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Ass'n, 414 U.S. 1045 (1973); *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358, 363 (9th Cir. 1955).

[35] *Reibert* v. *Atlantic Richfield Co.*, 471 F.2d 727, 731 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973) (employees who lose jobs because of a merger that violates the antitrust laws have no standing). *See Local 17* v. *Garrett Freightliners, Inc.*, No. 80-K-1685 (D.Colo. June 12, 1981) (following *Reibert*).

[36] *See Cromar Co.* v. *Nuclear Materials & Equip. Corp.*, 543 F.2d 501, 508 (3d Cir. 1976) ("[A]s we understand the law of this Circuit, a detailed analysis on a case by case basis of the factual context presented is required so as to preserve the effectiveness of the treble damage remedy without overextending its availability."). *Accord, Bravman* v. *Bassett Furniture Ind., Inc.*, 552 F.2d 90, 99 (3d Cir.) *cert. denied*, 434 U.S. 823 (1977).

[37] *Malamud* v. *Sinclair Oil Corp.*, 521 F.2d 1142, 1151 (6th Cir. 1975); *but see Lupia* v. *Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1169 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979) (suggesting that *Malamud* should be reconsidered in light of *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977)).

[38] In *Lupia*, *id.*, the plaintiff, an exclusive distributor, brought a price discrimination claim against a manufacturer. The court held the plaintiff would lack standing under any of "the various section 4 standing and injury doctrines." *Cleary* v. *Chalk*, 488 F.2d 1315, 1319 n. 17 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 938 (1974).

Fourth Circuit would give standing to any person who could show an injury that is "caused" by an antitrust violation in the simple, factual sense of the word "cause." Although the Fourth Circuit uses the words "direct," "immediate" and "proximately," McCready's injury is obviously indirect since the alleged boycott was *not directed at* McCready.

The Fourth Circuit's simple causation rule would, as the Fifth Circuit said in *Exxon Corp.*, subject defendants to "a myriad of treble-damage suits by all those in any way affected by an antitrust violation." [39] For this reason, this Court should grant the writ of certiorari to resolve this division of opinion among the circuit courts.

(b) The Decision of the Fourth Circuit is Contrary to the Principles Announced in this Court's Recent Decisions Under § 4 of the Clayton Act

Rule 17.1(c) of the Rules of this Court provides that another consideration in favor of granting the writ of certiorari is that the court below "has decided a federal question in a way in conflict with applicable decisions of this Court." This consideration supports granting the writ in this case because of the conflict between the decision of the Fourth Circuit and the principles announced in this Court's recent decisions under § 4 of the Clayton Act. Indeed, this case, which comes to this Court on a dismissal under Fed.R.Civ.P. 12(b)(6), is the logical next step in the evolution of the law of antitrust standing.

Since 1972, this Court has decided four important cases that are material to the standing issue presented here: *Hawaii* v. *Standard Oil Co.*,[40] *Illinois Brick Co.*

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[39] 632 F.2d 539, 547 (5th Cir. 1980).

[40] 405 U.S. 251 (1972).

v. *Illinois*,[41] *Reiter* v. *Sonotone Corp.*,[42] and *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*[43] Although these cases rest on a set of consistent principles regarding the scope of § 4 of the Clayton Act and the purposes of the antitrust laws, this Court has never decided the precise rules that govern antitrust standing.[44] That is the issue presented by this case.

In *Hawaii* v. *Standard Oil Co.*, this Court held that damage to the "general economy" of Hawaii was not injury to "business or property" within the meaning of § 4 of the Clayton Act. The rationale for this decision was that damage to the general economy of Hawaii would be simply a "reflection" of damage to consumers, for which they could, and might, recover themselves.[45] In a footnote, this Court commented that "[t]he lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." [46]

Thus, the underlying principle of *Hawaii* is that, in order to avoid multiple recoveries, only those persons most directly affected by an antitrust violation have standing under § 4 of the Clayton Act. In *Illinois Brick Co.* v. *Illinois*, this principle was elaborated. There this Court held that only a direct purchaser is "injured in his business or property" within the meaning of § 4 of

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[41] 431 U.S. 720 (1977).

[42] 442 U.S. 330 (1979).

[43] 429 U.S. 477 (1977). *Cf. J. Truett Payne Co.* v. *Chrysler Motors Corp.*, —— U.S. ——, 68 L.Ed.2d. 442 (1981).

[44] *See* Berger and Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809, 810, 841-42 (1977).

[45] 405 U.S. at 264.

[46] *Id.* at 262 n. 14.

the Clayton Act. Justice White, writing for the majority, pointed out the problems, including inconsistent judgments, of allowing a purchaser in an unrestrained market to assert claims based on restraints of trade in another market that may, or may not, have affected the price paid by the indirect purchaser.[47] The rationale underlying the decision in *Illinois Brick Co.* appears to be that an independent decision by a middleman, operating in an unrestrained market, determines whether an illegal overcharge is passed on to an indirect purchaser and, for this reason, an indirect purchaser is not "injured" by price-fixing at some other market level, but by the middleman's independent decision.

Applied to McCready's claim, this rationale requires that she not be accorded standing, because her alleged "injury" results from the independent decision of her employer to purchase a group contract that did not cover psychologists' services. Her employer could have purchased a broader, but of course more expensive, policy. It did not. Like the indirect purchasers in *Illinois Brick Co.*, McCready lacks standing.

The majority in the Fourth Circuit relied heavily on *Reiter* v. *Sonotone Corp.*, in which this Court held that a consumer who suffered noncommercial injury as a direct result of an antitrust violation was injured in her "business or property" within the meaning of § 4 of the Clayton Act. The holding of *Reiter* is not controlling in this case. McCready lacks standing not because her injury is noncommercial, but rather because she is not the object of the boycott alleged in her complaint. In contrast, the plaintiff consumer in *Reiter* was the "target" of the price-fixing conspiracy in that case. Indeed, retail purchasers were the only conceivable plaintiffs,

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[47] *E.g.*, 431 U.S. at 741-42. *See* Handler, *Changing Trends In Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 Colum.L.Rev. 979, 996 (1977).

since competitors of the price-fixing conspirators could not have complained of a conspiracy to raise prices. *Reiter* is entirely consistent with the principle that only a person who is an object of an antitrust violation has standing to assert claims based on that violation.

Finally, in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, a large manufacturer of automatic pinsetters and other bowling equipment acquired failing bowling alleys in the markets where plaintiffs operated bowling alleys. Plaintiffs sued and alleged that defendant's acquisition of bowling alleys violated § 7 of the Clayton Act because of defendant's "deep pocket." These acquisitions, according to plaintiffs, preserved competitors that otherwise would have gone bankrupt. This Court held that this was insufficient to show "antitrust injury" within the meaning of § 4 of the Clayton Act.[48] This is because plaintiffs had proven only a "causal link" between their injury and the violation of § 7 of the Clayton Act; this Court held that more than a mere "causal link" is required:

> If the acquisitions here were unlawful, it is because they brought a "deep pocket" parent into a market of "pygmies." *Yet respondents' injury*—the loss of income that would have accrued had the acquired centers gone bankrupt—*bears no relationship to the size of either the acquiring company or its competitors.* Respondents would have suffered the identical "loss"—but no compensable injury—had the acquired centers instead obtained refinancing or been purchased by "shallow pocket" parents, as the Court of Appeals itself acknowledged . . . Thus, respondents' injury was not of "the type that the statute was intended to forestall." [49]

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[48] 429 U.S. at 489.

[49] *Id.* at 487-88, *quoting from Wyandotte Co.* v. *United States*, 389 U.S. 191, 202 (1967) (note and citations omitted).

A contrary holding, this Court wrote, would make antitrust recovery "fortuitous." [50]

The rationale of *Brunswick Corp.* is, therefore, that a plaintiff under § 4 of the Clayton Act must prove *both* that his injury is "causally linked" to an antitrust violation, *and* that his injury is related to a reduction in competition caused by the violation and is thus an injury of the type the antitrust laws were "intended to forestall." McCready has alleged the former; she cannot allege the latter. McCready's loss is unrelated to any reduction in competition between psychologists and physicians, and like plaintiffs in *Brunswick Corp.*, McCready would have suffered the identical "loss" without any boycott as long as her employer declined to purchase a group policy that covered psychologists.

Thus, the decision of the Fourth Circuit is at complete odds with the principles on which this Court's recent decisions rest. The writ of certiorari should be granted to review the decision of the Fourth Circuit in light of the principles developed by this Court in its recent decisions under § 4 of the Clayton Act.

(c) The Issue of Standing Under § 4 of the Clayton Act, Which this Court Has Never Settled, Is of Extraordinary Importance for Antitrust Law

Rule 17.1(c) of the Rules of this Court states that the writ of certiorari may be granted, in the Court's discretion, when a Circuit Court has "decided an important question of federal law which has not been, but should be, settled by this Court." This is true here, because this Court has never squarely addressed the issue of standing under § 4 of the Clayton Act, which is an issue of great importance for antitrust law.

The size of the universe of potential antitrust plaintiffs is a critical question for antitrust law because of the combination of treble damages and the modern class

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[50] *Id.* at 487.

action.[51] The Fourth Circuit in this case has adopted a rule that allows standing to any plaintiff who can establish a causal link between his injury and an antitrust violation. This unwise rule carries with it all the evils of multiple lawsuits and inconsistent judgments that the "target area" rule was designed to avoid and that led this Court to adopt the "direct purchaser" rule of *Illinois Brick Co.* v. *Illinois*.[52] Stated bluntly, the combination of treble damages, consumer class actions and the Fourth Circuit's rejection of the "target area" rule is a legal disaster.

The facts of this case illustrate this problem well: here a subscriber to the Plans has persuaded the Fourth Circuit to rewrite a group subscriber contract purchased by her employer in a free market, unaffected by any antitrust violation. The employer could have purchased a more expensive group contract from another carrier that did cover the services of psychologists, but the employer independently decided not to do so. There is no allegation that the price of treatment by psychologists was increased unlawfully, or that subscribers were hindered in buying services from psychologists. Finally, Resnick, a clinical psychologist directly affected by the alleged boycott, has asserted an antitrust claim against the Plans and NSV in a separate action. In these circumstances, granting McCready standing advances no rational goal of the antitrust laws. Rather, as in *Brunswick Corp.*, her recovery would be "fortuitous" because it would depend entirely upon her employer's independent choice of insurance coverage.

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[51] *See Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 346 (1979) (Rehnquist, J., concurring) ("I think that the Court's observation . . . that 'the treble-damages remedy of § 4 took on a new practical significance for consumers with the advent of Fed.RuleCiv. Proc. 23' is a miracle of understatement.")

[52] 431 U.S. 720 (1977).

Since the Plans are nonprofit organizations whose only source of income is premiums collected from their subscribers, present and future subscribers will have to be assessed additional premiums in order to pay treble damages to McCready and the class she claims to represent. This potentially massive transfer of wealth from one group of subscribers to another is ironic and pointless. With respect to the damages McCready alleges, physicians (the alleged beneficiaries of the conspiracy) would pay nothing, and clinical psychologists (the alleged victims of the conspiracy) would receive nothing. Rather, one group of subscribers would receive a windfall at the expense of other subscribers.

On the basis of the Fourth Circuit's reasoning, the customers of the disfavored repair shop plaintiffs in *Proctor* v. *State Farm Mutual Automobile Insurance Co.*,[53] as well as the repair shops themselves, would have antitrust standing to complain of the "boycott" directed at the repair shops. The same would be true of the patients of the boycotted doctors in *St. Paul Fire & Marine Insurance Co.* v. *Barry*,[54] or of the patients of the boycotted chiropractors in *Ballard* v. *Blue Shield of Southern West Virginia, Inc.*[55] In each of these cases, the customers or patients would have standing, under the Fourth Circuit's rule, to recover treble damages and to force reformation of insurance contracts. This can serve no goal of antitrust policy.[56]

This Court should grant the writ of certiorari to settle this important issue of antitrust law by limiting stand-

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[53] 561 F.2d 262 (D.C.Cir. 1977), *remanded*, 440 U.S. 942 (1979).

[54] 438 U.S. 531 (1978).

[55] 543 F.2d 1075 (4th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977).

[56] P. Areeda & D. Turner, ANTITRUST LAW, § 334d, at 166 (1978).

ing under § 4 of the Clayton Act to those plaintiffs who are the direct objects of an antitrust violation.

(d) The Exclusion of Psychologists' Services from the Terms of the Group Contract for Prepaid Medical Services Is Exempt from the Antitrust Laws Under the McCarran-Ferguson Act

The district court ruled that McCready had sufficiently alleged a boycott to remove this case from the scope of the McCarran-Ferguson Act, but, as noted above, dismissed McCready's complaint for lack of standing.[57] The Plans and NSV raised the McCarran-Ferguson Act issue on appeal as an alternative ground for affirming the district court, but the Fourth Circuit did not address this issue.

The terms of the group contract in this case, which exclude from coverage the unsupervised services of psychologists, fall within the antitrust exemption provided by the McCarran-Ferguson Act. Furthermore, McCready has not alleged a "boycott" within the meaning of the McCarran-Ferguson Act.

In *Group Health & Life Insurance Co.* v. *Royal Drug Co.*,[58] this Court held that the McCarran-Ferguson Act exemption extended to "underwriting decisions" on the

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[57] Appendix A, at 7a.

[58] 440 U.S. 205 (1979). The Fourth Circuit in *VACP* misinterpreted this Court's decision in *Royal Drug*, which dealt with third-party contracts, and held that the terms of a health insurance contract limiting coverage to services of physicians was not the "business of insurance," because the terms affected providers. Directly contrary results have been recently reached by district courts in the Ninth Circuit, *Hahn* v. *Oregon Physicians' Service*, 508 F. Supp. 970 (D.Ore. 1981), *appeal docketed*, No. 81-3173 (9th Cir. Mar. 26, 1981), and in the District of Columbia Circuit, *Proctor* v. *State Farm Mut. Auto. Ins. Co.*, 1980-81 Trade Cas. (CCH) ¶ 63,591, at 77,140 (D.D.C. 1980).

one hand, and matters concerning the relationship between the insured and the insurer, such as the type of policy which could be issued, on the other. Here, McCready's claim of injury is based entirely on the provision in the group contract purchased by Prince William County that limits coverage to services performed by physicians. Under *Royal Drug*, the terms of insurance contracts fall within the "business of insurance" and are thus exempt under the McCarran-Ferguson Act.

Also, contrary to the district court's holding, McCready has not, and indeed cannot, allege a "boycott" sufficient to remove this case from the scope of the McCarran-Ferguson Act. An essential element of an antitrust boycott is an agreement among competitors.[59] The Plans are prohibited by a Virginia statute from competing with one another.[60] Since they cannot compete for subscribers, they cannot boycott in concert within the meaning of the McCarran-Ferguson Act. A unilateral "boycott" is not a violation of the antitrust laws, and an agreement not to deal by organizations that cannot compete is not a "boycott" within the meaning of the McCarran-Ferguson Act. The district judge, in ruling to the contrary, relied on *Ballard* v. *Blue Shield of Southern West Virginia, Inc.*[61] That case is not on point, because the Court of Appeals in *Ballard* must have assumed that the Blue Shield defendants in that case were allowed to compete under West Virginia law. In Virginia, that is not the case.

For these reasons, the group contract at issue here is clearly exempt from the antitrust laws under the

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[59] *See St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531 (1978).

[60] Virginia Code § 38.1-822.1.

[61] 543 F.2d 1075 (4th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977).

McCarran-Ferguson Act, and this Court should grant the writ of certiorari to address this issue of the application of the antitrust laws to insurance contracts.

CONCLUSION

For the reasons stated in this Petition, the writ of certiorari should be granted and the decision of the Fourth Circuit reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

Civil Action No. 78-496-A

VIRGINIA ACADEMY OF CLINICAL PSYCHOLOGISTS, *et al.*,
Plaintiffs,

v.

BLUE SHIELD OF VIRGINIA, *et al.*,
Defendants.

Civil Action No. 78-497-A
JANE DOE,
Plaintiff,

v.

BLUE SHIELD OF VIRGINIA, *et al.*,
Defendants.

MEMORANDUM OPINION

Following the argument on the pending motions in these actions on September 29, 1978, the Court made the following rulings from the bench:

(1) The two actions were consolidated for the purpose of pretrial discovery.

(2) The plaintiff Jane Doe's motion for a protective order precluding the public disclosure of her real name in depositions, interrogatories and in her action generally was denied.

(3) The defendants' motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(2), 12(b)(3), 12(b)(4) and 12(b)(5) were denied.

(4) Defendant Blue Shield of Virginia's (BS Va) motion for a protective order restricting dissemination of documents or information, which defendants designate as confidential because the documents involve trade secrets or confidential commercial or financial information, to counsel for the plaintiffs or their designated expert, was granted.

Reserved for decision were the following:

(1) Defendants' motion to stay the proceedings or dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

(2) Defendant BS Va's motion for a protective order insofar as certain document requests were concerned.

(3) Plaintiffs' motion for production of documents by BS Va.

(4) Plaintiffs' motion for establishment of time period and discovery guidelines.

(5) Defendant BS Va's motion to compel discovery.

12(b)(6) Motions

The defendants' grounds for these motions are as follows:

(1) That the plaintiff Virginia Academy of Clinical Psychologists (VACP) lacks standing to bring a federal antitrust action.

(2) That the plaintiff, Jane Doe, also lacks such standing.

(3) That the defendants are exempt from the federal antitrust laws by the McCarran-Ferguson Act.

(4) That the plaintiffs have failed to exhaust their administrative remedies.

(5) That the plaintiffs have not adequately pleaded a federal antitrust claim upon which relief can be granted.

(6) That the part of the complaint which alleges violations and damages arising prior to July 14, 1974 (four years prior to the time the action requesting damages was filed) should be dismissed as time barred by 15 U.S.C. § 15b (1976).[1]

(7) That, insofar as the defendant Neuropsychiatric Society of Virginia (NSV) is concerned, application of the antitrust laws to it for the conduct alleged would amount to an abridgement of NSV's first amendment right of free speech.

A brief background of the actions is helpful. The complaint reveals that the defendants in the actions are three Blue Shield Programs operating in Virginia, Medical Services of D.C. and the Neuropsychiatric Society of Virginia. The plaintiffs are VACP, a voluntary association representing clinical psychologists, and Dr. Robert J. Resnick, a clinical psychologist, in the one case, and Jane Doe, who has received the services of a Virginia clinical psychologist, in the other. They allege that the denial of direct reimbursement to clinical psychologists for their services amounts to a conspiracy in violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1976).[2]

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[1] "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections." 15 U.S.C. § 15b (1976).

[2] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal contracts or agreements prescribing minimum

VACP and Dr. Resnick sue pursuant to section 16 of the Clayton Act, 15 U.S.C. § 26 (1976),[3] and seek declaratory and injunctive relief. Jane Doe and her class, all subscribers to contracts for prepaid medical or related services with the defendants other than NSV, seek treble damages pursuant to section 4 of the Clayton Act, 15 U.S.C. § 15 (1976).[4] She alleges that she and her class

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prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 15 U.S.C. § 1 (1976).

[3] "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . ." 15 U.S.C. § 26 (1976).

[4] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue

have been denied reimbursement for fees paid to clinical psychologists as a result of the denial of coverage for direct (as opposed to through a psychiatrist) psychological services.[5]

The grounds of the 12(b)(6) motions will be discussed in order:

(1) The defendants argue that VACP lacks standing because no injury to VACP, as distinguished from its members, is alleged to VACP. This is true; that plaintiff, however, purports to bring the action on behalf of its members. The relief sought is injunctive and declaratory only under section 16 of the Clayton Act and individual participation of each allegedly injured party is not necessary for proper resolution of the action. *Warth* v. *Seldin*, 422 U.S. 490, 511 (1975). In *South Carolina Council of Milk Prod., Inc.* v. *Newton*, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966), the Fourth Circuit apparently assumed representative standing was proper even in a section 4 action, although the issue was not specifically addressed. Upon consideration of the allegations of this complaint, VACP has standing.

(2) Jane Doe's standing depends upon whether her injury was suffered within the sector of the economy competitively endangered by the defendants' alleged violations of the antitrust laws. *Reiter* v. *Sonotone Corp.*, [1978] Trade Cases ¶ 62,098 (8th Cir. June 19, 1978); *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977); *GAF Corp.* v. *Circle Flour Co.*, 463 F.2d 752 (2d Cir. 1972) *cert. dismissed*, 413 U.S. 901

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therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (1976).

[5] Jane Doe also has a pendent claim of breach of contract.

(1973); *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122 (9th Cir. 1973); *Calderone Enterprises, Inc.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971) *cert. denied*, 406 U.S. 930 (1972); and *South Carolina Council of Milk Prod., Inc., supra.*[6] The Court concludes that the sector of the economy *competitively* endangered by a violation by the defendants goes no further than that area occupied by the psychologists.[7] They are the ones allegedly being boycotted, not Jane Doe. Jane Doe, operating in a market which is unrestrained *insofar as she is concerned*,[8] may have suffered an injury by being unable to collect insurance from one of the defendants, but this injury is too indirect and remote to be considered "antitrust injury." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972), and *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), also seem to support a limited standing doctrine, although the latter case was decided in the context of a section 7 action. See generally Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term —1977*, 77 Colum. L. Rev. 979, 989 (1977). While standing and antitrust injury may or may not be treated as the same issue, in this case Jane Doe does not have the former because she has not sustained the latter. Accordingly, her complaint must be dismissed.

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[6] Unlike the situation in *South Carolina Council of Milk Prod.* v. *Newton, supra*, which held that a nonspecific complaint of antitrust injury was sufficient to compel a trial on the merits to see if such injury was proximately caused by the alleged violation, here we know from the complaint exactly what injury is alleged.

[7] This determination of the sector of the economy competitively endangered establishes, in the Court's view, the standing of the individual plaintiff Resnick in the section 16 action.

[8] There is no suggestion that the plaintiff Jane Doe cannot obtain insurance coverage for psychological treatment from insurance carriers other than the defendant providers, although there is an allegation that the defendant providers are dominant in the field.

The Court further concludes that in the exercise of its discretion Jane Doe's pendent breach of contract claim should also be dismissed, since no independent jurisdictional ground for its maintenance exists.

(3) The answer to whether the Blue Shield defendants, because they conduct insurance businesses, are exempt from the antitrust laws by virtue of the McCarran-Ferguson Act was, in the Court's view, decided by *Ballard* v. *Blue Shield of Southern W. Va., Inc.*, 543 F.2d 1075, 1078 (4th Cir. 1976). In *Ballard*, the Fourth Circuit found that Blue Shield's refusal of health insurance coverage for chiropractic services fell within the exemption of the McCarran-Ferguson Act,[9] subjecting insurance companies who have participated in such "boycotts" to the antitrust laws. 543 F.2d at 1078. In the present case a boycott of psychologists is sufficiently alleged in the complaint to meet the exception to the Act contained in 15 U.S.C. § 1013(b) (1976).

(4) The short answer to the defendants' argument that plaintiffs have failed to exhaust their administrative remedies is that there is no administrative remedy available which will give plaintiffs the relief they seek. The question is of course moot insofar as Jane Doe is concerned since the Court has concluded that she lacks standing to bring a federal antitrust action. Yet it is obvious that the Virginia State Corporation Commission (SCC), the body to which the defendants say plaintiffs should look for relief, would have had no jurisdiction to award her treble damages. Insofar as the other plaintiffs are concerned, the SCC does have jurisdiction to determine whether the defendants are complying with state law and regulations and to examine the constitu-

[9] ". . . Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation." 15 U.S.C. § 1013(b) (1976).

tionality of those enactments. *Blue Cross of Virginia* v. *Commonwealth of Va.*, —— Va. ——, 239 S.E.2d 94 (1977). The violation of state law, however, is only part of plaintiffs' claim; and the SCC would have no jurisdiction to determine whether the defendants had conspired to injure the plaintiffs or to grant injunctive relief against such a conspiracy. Apparently the SCC has under consideration the constitutionality of Va. Code Ann. 32-195.10:1 (Cum. Supp. 1978).[10] Some of the defendants are before the SCC urging that the section is unconstitutional. Should they prevail in this assertion, plaintiffs' prayers for relief remain unanswered. Should they not prevail, the plaintiffs are still unrelieved.

(5) Mindful of the admonition of higher courts that complex antitrust claims should rarely be decided on motion, *cf. Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 473 (1962), the Court concludes that the antitrust violations have been adequately pleaded. The defendants are given fair notice of the plaintiffs' claim that plaintiffs, as psychologists, are being boycotted as providers of covered services as a result of the defendants' concerted action. This is sufficient. *Conley* v. *Gibson*, 355 U.S. 41 (1957). Nor is the Court persuaded by the 1934 case of *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F.2d 885 (4th Cir. 1934), cited by the defendants, that at

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[10] "No plan for furnishing prepaid medical and surgical, and similar or related services, or any of such services, shall fail or refuse, either directly or indirectly, to allow or to pay for such services, or any part thereof, rendered by any doctor of podiatry, doctor of chiropody, or optometrist, optician and psychologist duly licensed to practice in Virginia, to the holder of any contract or subscription contract issued under or pursuant to such plan if the services rendered (a) are services provided for by such contract or subscription contract and (b) are services which the doctor of podiatry, doctor of chiropody or optometrist, optician and psychologist is licensed to render in Virginia." Va. Code Ann. 32-195.10:1 (Cum. Supp. 1978).

this late date we should revert to the technical rules of pleading which were formerly prevalent.

(6) The argument that portions of the relief sought are time barred seems principally addressed to the section 4 damage claims of Jane Doe—now rendered moot. To the extent that the argument is addressed to the complaint for injunctive and declaratory relief, no striking of the complaint is warranted. Activities which predate the limitation period may well be relevant to the existence of unlawful conduct within that period.

(7) NSV's assertion is that it is being sued because of its willingness to take a position on an issue of major public concern—namely, the appropriate extent of coverage of pre-paid health plans—and to communicate that position to interested parties. A denial of such a right would, NSV asserts, abridge its first amendment right of free expression. And it would indeed do so if that is all that NSV has done; and in that event there could be no relief awarded against NSV for violation of the federal antitrust laws. But this is a defense on the merits. As adequately pleaded, NSV shares the complicity of the other defendants in concerted activity to boycott the plaintiffs. Such an assertion is sufficient to survive a 12(b)(6) motion to dismiss.

Motion to Stay

The grounds for defendants' motions to stay are twofold: *first*, because of *Group Life & Health Insurance Co.* v. *Royal Drug Co., cert. granted*, 46 U.S.L.W. 3541 (1978), presently pending before the Supreme Court, a decision which the defendants believe will be dispositive of the issues in this action; and *second*, because of the pending SCC proceeding involving some of these defendants.

Insofar as the pendency of *Royal Drug* is concerned, it is extremely doubtful that a decision in that case will

resolve the issues here. No question concerning a boycott is presented in *Royal Drug*. Consequently, *Ballard* v. *Blue Shield of Southern W. Va.*, *supra*, would govern the applicability of the McCarran-Ferguson Act to the instant action. Since *Ballard*, as indicated previously, holds that boycotts of the type here alleged are not protected by McCarran-Ferguson, there is no need to delay the progress of these actions.

The facts concerning the pendency of the proceeding before the SCC are apparently these: that case began on April 22, 1977 when the SCC (a regulatory body and a court of record) issued an order compelling Blue Cross and Blue Shield of Virginia to show cause why the SCC should not declare void all their subscriber contracts approved by the Virginia Bureau of Insurance which are contrary to Va. Code Ann. § 32-195.10:1, *supra* n. 10. This statute, as amended in 1973, prohibits the refusal to reimburse for otherwise-covered services rendered by, among others, psychologists licensed in Virginia to render such services. Blue Cross and Blue Shield concede they are not in compliance with § 32-195.10:1 since, with certain minor exceptions, they do not reimburse for services rendered by psychologists unless such services are performed under the supervision of a licensed physician. As their only defense to the show cause order, Blue Cross and Blue Shield assert that § 32-195.10:1 does not represent a valid or proper exercise of the police power of the Commonwealth of Virginia and is void and unenforceable under both the Constitution of the United States and the Constitution of Virginia. The question of the statute's constitutionality, being a mixed question of law and fact and the only issue in those proceedings, is set for hearing January 22-25, 1979.

Previously, on July 15, 1977, the SCC, finding it had no jurisdiction to decide the constitutionality of § 32-195.10:1, denied the motion to dismiss and declared void

all provisions of Blue Cross' and Blue Shield's subscriber contracts contrary to the statute. On appeal, the Supreme Court of Virginia reversed the SCC's July 15, 1977 order and remanded the case for determination of the constitutionality of the statute. *Blue Cross of Virginia* v. *Commonwealth of Va., supra.* Having intervened in the proceeding, the Virginia Attorney General then moved the SCC for summary judgment, asserting that § 32-195.10:1 is in fact constitutional and valid. Relying upon both written memoranda and oral argument, the SCC denied the motion for summary judgment.

Defendants rely on the doctrines of primary jurisdiction and abstention to support a stay pending the outcome of the SCC proceeding. Insofar as primary jurisdiction is concerned they cite as controlling authority *Carter* v. *Am. Tel. & Tel. Co.*, 365 F.2d 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967). There, in a private antitrust action, a tariff was allegedly used and enforced by the defendants to accomplish a violation of the federal antitrust laws. The court held that primary jurisdiction was vested in the Federal Communications Commission (FCC) to determine the justice, reasonableness, validity and effect of the tariff. Consequently, the circuit court upheld the district court's reference of the question of the tariff's validity to the FCC since the circuit court concluded that the validity of the tariff was at the core of the plaintiff's antitrust claim; the resolution of the question of this validity would determine all or a principal part of the action; and the FCC would hardly uphold a tariff that was brought into existence by concerted action motivated by a monopolistic aim, as opposed to an aim of improving or maintaining telephone service. Quite the opposite is true here. The SCC's sole inquiry is the constitutionality of Va. Code § 32-195.10:1. It cannot inquire into the motives that brought that enactment into being. The validity of the section is not at the center of plaintiffs' claim. If the SCC upholds its

constitutionality, it merely means the defendants have been violating the law for five years since the defendants concede they have not adhered to it. It will not, however, determine whether the defendants have violated the federal antitrust laws. If the section is found unconstitutional the plaintiffs' actions will go forward. Moreover, as pointed out before, plaintiffs' claim does not rely solely on this statute.

For the same reasons just discussed, abstention is not appropriate. Awaiting a decision by the SCC (and presumably the final resolution of the issue on appeal) will accomplish no economy in judicial or party energies. Nor are other factors present, such as the mooting of a federal constitutional claim by a state resolution of an issue on other grounds, which could invoke abstention. A stay on the grounds suggested by defendants would be evading the responsibility and obligation of the federal courts to exercise the jurisdiction given them. *Colorado River Water Constr. District* v. *United States*, 424 U.S. 800 (1976).

The motion to stay will therefore be denied.

Plaintiffs' Motion for Production of Documents and Defendants' Motion for a Protective Order

Plaintiffs' motion requesting that defendants comply with the request for production of documents contained in Paragraphs 5, 7, 10, 11 and 17 of plaintiffs' request filed with the complaint will be granted since those documents could well lead to relevant evidence of an agreement among the defendants. The request contained in Paragraph 18 will be denied since the production and examination of the many, many files involved would be unduly burdensome and would be unlikely to lead to relevant evidence.

Plaintiffs' Motion for
Establishment of Deadlines

Discovery of documents and answers to interrogatories will not be limited to four years prior to the time the actions were filed. Although this time period may be applicable when the Court considers any actual misconduct on defendants' part, activities prior to that time may well lead to relevant information concerning conduct within the four year period. Accordingly, discovery will be allowed for information and documents available or in existence from and after January 1, 1972.

BS Va's Motion to Compel Discovery

Since this motion concerns Jane Doe in the section 4 action, it will be dismissed as moot.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
October 10th, 1978

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 78-1883

CAROL MCCREADY, individually and on behalf of all others similarly situated,
Appellant,

v.

BLUE SHIELD OF VIRGINIA;
BLUE SHIELD OF SOUTHWESTERN VIRGINIA;
NEUROPSYCHIATRIC SOCIETY OF VIRGINIA, INC.
Appellees,

and

MEDICAL SERVICE OF THE DISTRICT OF COLUMBIA, INC.,
Defendant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria
Albert V. Bryan, Jr., District Judge

Argued October 4, 1979 Decided May 12, 1981

Before BUTZNER and WIDENER, Circuit Judges,
and THOMSEN, Senior District Judge*

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* United States District Court for the District of Maryland, sitting by designation.

Timothy J. Bloomfield (Alan J. Kriegel, Dunnells, Duvall, Bennett & Porter; Warwick R. Furr, II, Lewis, Mitchell & Moore, on brief) for Appellant; R. Gordon Smith (James H. Walsh, McGuire, Woods & Battle; Ronald M. Ayers, Heman Marshall, Woods, Rogers, Muse, Walker & Thornton; Joel I. Klein, Eugene Comey, Rogovin, Stern & Huge; Francis J. Prior, Jr., Siciliano, Ellis, Sheridan and Dyer, on brief) for Appellees.

THOMSEN, Senior District Judge:

Carol McCready brought this action in the United States District Court for the Eastern District of Virginia, claiming that defendants Blue Shield of Virginia, Blue Shield of Southewestern Virginia, Medical Services of the District of Columbia (collectively, Blue Shield) and the Neuropsychiatric Society of Virginia participated in an unlawful combination and conspiracy to exclude clinical psychologists from receiving compensation under Blue Shield's prepaid health care plans in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 [1] and Section 4 of the Clayton Act, 15 U.S.C. § 15.[2] McCready brought the case as a class action on behalf of all Blue Shield subscribers in Virginia who incurred costs for psychological services since 1973 but who were

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[1] § 1 of the Sherman Act provides in part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . . .

[2] § 4 of the Clayton Act provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in the district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

not reimbursed for those costs under the applicable health care plans of Blue Shield. She sought treble damages and attorney's fees as provided by the antitrust laws. The district court dismissed her complaint on the grounds that McCready had no standing to bring such an action and had suffered no antitrust injury because her injury was not suffered within the sector of the economy endangered by defendants' alleged violations of the antitrust laws.[3]

From September 1975 until January 1978, McCready, an employee of Prince William County, Virginia, was a subscriber to one of the health care plans administered by Blue Shield. The county provided its employees group coverage purchased from Blue Shield of Virginia. That group plan provided for reimbursement to subscribers for treatment by psychiatrists, or by psychologists whose services were supervised and billed by a treating physician. No reimbursement was allowed for treatment by psychologists unless billed through a treating physician.

During the period of her health care coverage through Blue Shield, McCready received treatment from a clinical psychologist. She unsuccessfully sought reimbursement of those bills from Blue Shield.[4] In 1978, she brought this action, claiming a conspiracy by defendants to boycott psychologists, which she alleged was effectuated by Blue Shield's refusal to reimburse its subscribers for costs of psychological services because those services were rendered and billed by a psychologist and not by a physician.

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[3] McCready also sought relief through the court's pendant jurisdiction, on a breach of contract claim. The dismissal of the pendant claim is not before us on appeal.

[4] McCready was mistakenly paid $128.00 by Blue Shield after submission of claims for psychological services. Once the error was discovered, Blue Shield sought to obtain a refund from McCready of that amount.

The alleged conspirators are the Blue Shield defendants, listed above (all of which are separate non-stock corporations engaged in the business of health care plans), Neuropsychiatric Society of Virginia, a not-for-profit non-stock corporation whose members are psychiatrists practicing in Virginia, and other unnamed co-conspirators. By agreement among themselves, it was alleged, those parties sought to exclude psychologists from reimbursement coverage under Blue Shield's contracts in the State of Virginia.

A related action was filed in the same district court by the Virginia Academy of Clinical Psychologists (VACP), and the two cases were consolidated for pretrial discovery purposes. Motions to dismiss were filed by the defendants in each case and were heard together.

The district court granted the motion to dismiss the case now before us on appeal, but denied the motion to dismiss the VACP case.

In its opinion granting defendants' motion to dismiss the instant case, the district court concluded that "the section of the economy *competitively* endangered by a violation by the defendants goes no further than that area occupied by the psychologists." (Emphasis in original) Therefore, it reasoned, McCready was "operating in a market" which was "*unrestrained insofar as she is concerned*;" and her injury was "too indirect and remote" to be an antitrust injury. The district court also stated that "[w]hile standing and antitrust injury may or may not be treated as the same issue, in this case Jane Doe [McCready] [5] does not have the former because she has not sustained the latter." As a result, the district court dismissed McCready's complaint because of lack of standing to sue.

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[5] McCready brought this action under the pseudonym "Jane Doe," but the district judge required her to disclose her true name.

The VACP case went to trial on the merits and resulted in a judgment for defendants. *Virginia Academy, etc.* v. *Blue Shield of Virginia*, 469 F. Supp. 552 (E.D. Va. 1979). That judgment was affirmed in part, vacated and remanded in part, by another panel of this court, No. 79-1345, —— F.2d —— (June 16, 1980), which should be read in connection with this opinion, although it did not deal with all the issues presented by this appeal.

McCready contends that she not only has suffered a property injury within the meaning of the antitrust laws but that her injuries were suffered by reason of the antitrust violations alleged. Since McCready appeals the granting of defendants' motion to dismiss, we take as true all facts well pleaded in her complaint.

The Clayton Act provides that an antitrust plaintiff must have been injured in his "business or property," and further, that such injury must result by reason of something "forbidden in the antitrust laws."

McCready's contention, that consumers who have suffered non-commercial monetary injury as a result of an antitrust violation have been injured in their property within the meaning of the Clayton Act, was decided favorably to her position by the Supreme Court in *Reiter* v. *Sonotone Corp.*, 442 U.S. 330 (1979), after the district court had entered its order. The district court, however, did not rely on the fact that her claimed injury was non-commercial in dismissing the complaint.

The plaintiff in *Sonotone* was a consumer who alleged that as a result of antitrust violations, including horizontal and vertical price-fixing, she was forced to pay an artificially high price for a hearing aid. She brought a class action against the hearing aid manufacturers. The district court certified for interlocutory review the issue of consumer standing. In reversing the decision of

the Court of Appeals denying such standing, the Supreme Court held that "[a] consumer whose money has been diminished by reason of an antitrust violation has been injured 'in his . . . property' within the meaning of § 4 [of the Clayton Act]". Id. at 339. Therefore, Reiter's allegation of financial loss because she paid a higher price as a result of Sonotone's anti-competitive conduct was sufficient to make out an injury to her "property" within the meaning of § 4 of the Clayton Act.

McCready can no longer be denied standing simply because she is a consumer with a non-commercial monetary loss. *Sonotone*, however, is not dispositive of all of the issues here. The consumer still must prove that her injury resulted from an antitrust violation.

Although the ultimate goal of the conspiracy alleged by plaintiff was the exclusion of clinical psychologists from a large segment of the market, the direct victims of the conspirators include McCready and the class of similarly situated patients whom she seeks to represent, as well as the clinical psychologists; both were in the target area. The complaint alleges that the conspirators exclude psychologists by making it too expensive for Blue Shield subscribers to consult them. This is accomplished by Blue Shield's refusal to reimburse a subscriber for the services of a psychologist unless the patient also consulted a physician. In contrast, Blue Shield would reimburse a subscriber who received similar treatment from a psychiatrist without further consultation. McCready alleges that as a result of the conspiracy, Blue Shield denied her reimbursement for sums she paid for treatment when she consulted a psychologist instead of a psychiatrist.

Section 4 of the Clayton Act affords relief to "[a]ny person . . . injured in his . . . property by reason of anything forbidden in the antitrust laws . . . ." By its terms the Act does not restrict standing to competitors

who are the targets of anticompetitive behavior. *Sonotone*, supra. It encompasses "any person" whose property loss is directly or proximately caused by violation of the law. See *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F.2d 414, 417 (4 Cir. 1966). McCready satisfies these requirements. Her injury was immediate and direct. Although denial of reimbursement was designed to divert her and other subscribers from psychologists to psychiatrists, this goal does not make her loss too remote or indirect to be covered by the Act.

Use of the catch words "target area" is convenient to deny standing, but it can be justified only when the underlying purposes of the phrase are served. It is generally recognized that the target area test for denial of standing serves two purposes. First, it bars suits by persons whose damages are speculative and difficult to prove. See *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit*, 454 F.2d 1292, 1295 (2 Cir. 1971). This reason for denying standing does not apply to McCready. Her damages can be readily ascertained to the penny; they are her reimbursable costs of treatment. These are fixed by her Blue Shield contract as 80% of the amount she paid the psychologist.

The second purpose of the target area is the prevention of multiple recoveries by different plaintiffs against the same defendants for a single injury. *Ames* v. *American Telephone & Telegraph Co.*, 166 F. 820, 823 (C.C.D. Mass. 1909). The second reason for denying standing also does not apply to McCready. There can be no double recovery. She has already paid her psychologist's bills; the psychologist suffered no damage in this respect. Although McCready is a consumer and not a competitor, her allegations of direct pecuniary loss by reason of antitrust violations are sufficient to confer standing. *Sonotone, supra; South Carolina Council of Milk Producers*, supra.

* * * *

The judgment of the district court is reversed and the case is remanded for further proceedings to determine the propriety of certifying the class and the merits of plaintiff's claim as alleged in her complaint.

REVERSED AND REMANDED WITH INSTRUCTIONS.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

I

My first point of dissent with the majority is upon its construction and application, or non-application strictly speaking, of the target area rule.

The majority proceeds upon an erroneous factual premise and then follows up that error. The erroneous premise is found on page 10 of its opinion, and is as follows:

> "Although denial of reimbursement was designed to divert her [Miss McCready] and other subscribers from psychologists to psychiatrists, this goal does not make her loss too remote or indirect to be covered by the Act."

The difficulty with the statement is that Miss McCready did not plead or otherwise show that any alleged conspiracy was either "designed to divert her" from a psychologist to a psychiatrist, or that any such "goal" existed. The nearest thing in her pleadings to the factual premise relied upon by the majority is that "as a further consequence of the acts and practices described hereinabove: . . . patients have been economically coerced to receive psychological services from psychiatrists rather than clinical psychologists. . . ." Thus, even the plaintiff does not describe her injury as a design or goal of any antitrust violation, rather as a consequence thereof.

It is just such a difference that the target area rule applies to.

While referring to our case of *South Carolina Council of Milk Producers* v. *Newton*, p. 417, as support for the proposition that any person whose property loss is directly or proximately caused by violation of law has

standing to sue, the majority neglects to give any effect to *Newton*, p. 419, that if the injury to the plaintiff is only incidental or consequential, or if the plaintiff is so removed from defendants' acts that his injury is only remotely caused by defendants' antitrust actions, then the plaintiff is not injured by reason of anything forbidden in the antitrust laws. It is this restriction on coverage which was not altered by *Sonotone*, I submit, and my conclusion is verified by the other circuits which have considered the matter since that case.

As just stated, we have spoken to the issue of injury by reason of an antitrust violation in *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F.2d 414 (1966). There a group of milk producers brought an action under the antitrust laws against wholesale and retail grocers, alleging that their conspiracy to sell milk at unreasonably low prices resulted in an unlawful diversion of the milk trade to the defendants, with a resulting threatening of the economic existence of the milk industry in South Carolina. The district court granted summary judgment for the defendants on the ground that there was no privity of contracts or direct competition to result in a direct injury actionable under the antitrust laws.

This court reversed, holding that § 4 does not limit relief to persons with a direct contractual or competitive relationship with those charged with an antitrust violation. A cause of action under § 4 of the Clayton Act, we held, is not dependent upon a contractual or competitive relationship between the parties. All a plaintiff must show to have standing to sue under § 4 is that he is "within the sector of the economy in which the violation threatened a breakdown of competitive conditions and that he was proximately injured thereby. . . ." *Newton* at 418. The court cautioned, however, that if the injury to the plaintiff is only incidental or

consequential or if the plaintiff is so removed from the defendant's acts that his injury is only remotely caused by defendant's antitrust actions, then the plaintiff is not injured by reason of anything forbidden in the antitrust laws.

This is what is called the "target area" test which has been followed by a number of circuits,[1] as well as our own, and which I think cannot be explained away largely by a description of the rule as "catch words." It was thoroughly discussed by the Ninth Circuit in *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358 (1955), relied upon by this court in *Newton.* There a manufacturer of car wax was allowed to sue *Richfield Oil*, a producer of petroleum products, which had entered into agreements with independent service station operators who sold Richfield Oil products for the exclusive selling of certain auto accessories, including car wax,

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[1] The target area test has been followed by the Second Circuit in *Calderone Enterprise Corp.* v. *United Artists Theatre Circuit*, 454 F.2d 1292 (1971), cert. den., 406 U.S. 930 (1972), and many other cases. It has as well been followed by the cases mentioned in this opinion and still other other cases which I do not attempt to list.

The Second Circuit describes the target area rule as follows in *Calderone*, at p. 1295, and, while remembering that it should be applied on a case by case basis, I think the rule as applied in the Second Circuit should be followed:

> "In a series of decisions over the last 15 years, in all of which certiorari was denied by the Supreme Court, this court has committed itself to the principle that in order to have 'standing' to sue for treble damages under § 4 of the Clayton Act, a person must be within the 'target area' of the alleged antitrust conspiracy, i.e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued. Accordingly we have drawn a line excluding those who have suffered economic damage by virtue of their relationships with 'targets' or with participants in an alleged antitrust conspiracy, rather than by being 'targets' themselves. . . ."

sponsored by, but not made by, Richfield. Those sponsored accessories did not include Karseal's products. The court held that the right to sue was not limited to those independent distributors of Karseal's wax. In determining who has standing to sue, the courts must look at who the illegal act was aimed to injure. A bystander, who is not the intended victim of the antitrust violation but who is injured nonetheless, cannot sue under the antitrust laws. His injury is too remote.

In other words, it is not enough that a plaintiff show that one purpose of the defendant's act was a restraint of trade and that the act committed caused injury to the plaintiff. He must go further and show that he was within the sector of the economy endangered by the breakdown in competition in order to satisfy the "by reason of" requirement. *Karseal* at 363.

Miss McCready alleges that the district court erred by incorrectly applying the target area standard of *Newton*, as reflected in its conclusion that "the sector of the economy *competitively* endangered by a violation of the defendants goes no further than that area occupied by the psychologists." She quarrels with the district court's use of the word "competitively" as being contrary to the holding of *Newton*, where we noted that direct competition is not a prerequisite for standing. Although it may not be completely clear, I do not read the language of the district court to require direct competition between the parties. All the district court said was that the target of the Blue Shield defendants' actions was the psychologists and not the subscribers of Blue Shield plans. The district court did not use the word as a *sine qua non* of its decision but merely as descriptive of the way one sector of the economy was endangered by the defendants. The fact that Miss McCready was not in the threatened sector, the district court properly considered as supporting its conclusion to dismiss the complaint.

I would hold that plaintiff does not satisfy the requirement of § 4 that she be injured "by reason of" a violation of the antitrust laws. She does not claim that the actions of the Blue Shield defendants were aimed at injuring any group beyond the psychologists. The psychologists make up the group within the sector of the economy in which the illegal conduct of the Blue Shield defendants threatens to break down competitive conditions. Any injury to Miss McCready is too indirect and consequential to be actionable under § 4 of the Clayton Act. As the district court said, she operated in a market which was unrestrained so far as she was concerned.

My conclusion that the district court was correct in denying recovery is fortified, I think, by the reasoning of the Court in *Sonotone*, as well as by its acknowledgment in *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 262, n. 14 (1972), that "[t]he lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy for damages for all injuries that might be conceivably traced to an antitrust violation." In *Sonotone*, while holding that a consumer who purchased goods at an artificially high price caused by antitrust violations was injured in his property, the Court recognized that "[t]he phrase 'business or property' also retains restrictive significance," giving as an example personal injuries. It continued that "Congress must have intended to exclude some class of injuries by the phrase 'business or property' ". I thus think it is beyond argument that injury to business or property under § 4 has a restrictive meaning. The question before us is whether the plaintiff brings herself within the terms of the statute as construed by the applicable cases.

While no case is found subsequent to the decision in *Sonotone* on the same facts as those presented here, all three Circuits which have considered the matter since

that time have adhered to their earlier rulings giving restrictive significance to the requirement of § 4 of the Clayton Act, that, in order to recover, an antitrust plaintiff must have been injured in his business or property by something forbidden in the antitrust laws.

The first of those cases was *In re: Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979) (a multidistrict case). There, the plaintiffs were producers of fat cattle. They alleged that 25 retail food chains and others, by agreeing to purchase only at artificially low prices from slaughterhouses and packers, caused these low prices to be passed up the chain of distribution which reduced the prices the plaintiffs received in selling their cattle to the packers and slaughterhouses. Some of the plaintiffs alleged that they had purchased beef at retail as consumers at prices artificially high because of a retail price fixing conspiracy by the same defendants. The other plaintiffs did not so allege, however. Those who did not allege that they had purchased beef from the defendants maintained that the retail price fixing conspiracy reduced consumer demand for beef, thus derivatively reducing the retailers' and the packers' demand for their fat cattle. Their claim, then, was that they were injured by the retail price fixing conspiracy just as much as if they had bought beef. Relying on *Sonotone*, the court reversed the district court's striking the allegations of retail price fixing from the complaints of those plaintiffs who had purchased beef at retail. It sustained, however, the striking of the retail price fixing allegations from the complaints of the plaintiffs who had not purchased beef at retail. The court held squarely that those plaintiffs who had not purchased at retail did not have standing to sue for such remote injury, and that they were not within the target area of the retail antitrust conspiracy. The court held that the target of a retail price fixing conspiracy was the retail purchaser, and reasoned that recognizing the non-

purchasing plaintiffs as targets of the retail price fixing conspiracy would be to grant antitrust standing to firms and persons at every level of beef production and distribution, quoting note 14 in *Hawaii* v. *Standard Oil* as I have above.

The next case following *Sonotone* was *Sherman* v. *British Leyland Motors Ltd.*, 601 F2d 429 (9th Cir. 1979). Sherman was the owner of a corporation which had alleged a valid claim against British Leyland and others under the antitrust laws. His corporation had been forced to go out of business because its Triumph distributorship franchise had been canceled as a result of antitrust violations by the defendants. Although Sherman was injured in fact, and that was accepted, the court held that Sherman had no standing to sue in his individual capacity as a shareholder or as a creditor of his corporation because the loss was indirect. Id. at p. 439, 440.

The last decision of a court of appeals since *Sonotone* is *Engine Specialties, Inc.* v. *Bombardier Ltd.*, 605 F2d 1 (1st Cir. 1979). ESI had a contract with Agrati, an Italian firm, as Agrati's sole distributor in North America for Agrati minicycles. Bombardier wanted that distributorship, interfered with ESI's contractual relationship with Agrati, and agreed with Agrati to divide the market. The claim against Bombardier for interference with contractual relations aside, the court held that ESI had a valid claim under the Sherman Act against Bombardier for agreeing with Agrati to divide the market because the agreement necessarily required the extinction of ESI as North American distributor. Two of ESI's subdistributors were Durham and Watercraft. ESI's demise as the Agrati distributor necessarily resulted in their inability to obtain the Agrati product and in financial loss to them in having to compete with the product and in a consequential loss of sales. Actual injury to them

was acknowledged by the court. The court held, however, that neither Durham nor Watercraft had standing to sue under § 4 of the Clayton Act because they lay outside the target area of the conspiracy. The court found that the conspiracy between Bombardier and Agrati to divide markets was not aimed at the market level to which Durham and Watercraft were operating, that the anti-competitive acts taken against ESI were directed solely at ESI as a part of the scheme to divide territories, and that Durham and Watercraft were not the principal victims of the conspiracy but were innocent bystanders who were hit but not aimed at. The court said that "[a]lthough the natural result of depriving ESI of the Agrati product was to likewise deprive ESI's distributors of it, we think the distributors lie outside the target area section 4 encompasses." 605 F2d at 18. As did *Sherman* and *Beef Industries*, the court here considered the effect of *Sonotone* and nevertheless found that the plaintiffs did not have standing.

While two of the three cases [2] just discussed have no retail consumer as a plaintiff, each of the three stand for the proposition that the antitrust plaintiff must have been in the target area encompassed by the anticompetitive actions of the defendant or else recovery is not permitted.

I am of opinion the injury to McCready, that she is not eligible for reimbursement under her contract with Blue Shield, is too indirect and consequential for her to prosecute that claim under § 4 of the Clayton Act. She is not in the target area, that being in this case the

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[2] A fourth case, *Lucas* v. *Bechtel Corp.*, 633 F.2d 757 (9th Cir. 1980), intimates a compliance both with *Sonotone* and the Ninth Circuit's target area rule as expressed *In re Multidistrict Air Pollution*, 481 F.2d 122 (9th Cir. 1973), but the facts upon which that court relied for "inferences of standing" are not sufficiently stated in the opinion for me to rely on that case here.

psychologists. The price of psychologists' services to her was not increased by any act of the defendants. The fact that her Blue Shield contract, which was in the nature of insurance, would not reimburse her for those services had nothing to do with the price she paid for the services, which indeed were not artificially inflated by an antitrust violation. The area in which she operated was entirely unrestrained. I think McCready's claim falls squarely within the reasoning of *Sherman*, *ESI*, and *Beef Industries*.

The fact that Miss McCready's status as a consumer does not, under *Sonotone*, necessarily preclude her suit for lack of standing, does not mean that she necessarily has standing to sue as an antitrust plaintiff in this case, for, as the cases demonstrate, an antitrust plaintiff may have suffered actual injury but not be within the target area of the antitrust violation. If whether or not she was in the target area were questionable and subject to proof, then I would be inclined to hold that she had standing, and, if her claim should be dismissed, to require the dismissal of the claim for failure to state a claim upon which relief may be granted. *Bell* v. *Hood*, 327 U.S. 678 (1946); *Osborn* v. *Bank of United States*, 22 U.S. 738 (1824). For, as *Bell* and *Osborn* hold, when the jurisdiction of the court and the cause of action depend on the same fact, the court should assert its jurisdiction, and, if the case should be dismissed, dismiss it for failure to state a cause of action. She, however, has left no room for proof. Her only injury is that she has been unable to receive reimbursement for her psychologists' bills. There is not even a claim that her psychologists' bills are higher than they would have been had the conspiracy not existed. It is true that standing is a jurisdictional question. *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 260 (1977), but the facts as stated by the plaintiff show that she has no standing because they show that she is not within the

target area of the antitrust violation. Thus, dismissal of her case for that reason was proper. It is not necessary to remand for dismissal for failure to state a claim under *Bell* and *Osborn*.

While the standing issue in antitrust actions is a complex one and while I am warned that dismissal of antitrust claims on motions should be used "sparingly," *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464 (1962), I do not believe the district court erred in dismissing the complaint on motion. The plaintiff simply has not stated a claim to standing under § 4 of the Clayton Act. The plaintiff in *Sonotone* was a retail purchaser, and the violations charged included "vertical and horizontal price fixing." *Sonotone*, p. 335. While the plaintiff here might be considered a retail purchaser of services, there not only is no allegation of price fixing, there is no claim or allusion to it. The plaintiff has not placed herself within the protection of *Sonotone*.

II

A separate and more general ground for my disagreement with the result obtained by the majority is a proposition which has not been discussed in the allied case of *Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia, et al*, 624 F2d 476 (1980), in the opinion of the district court, or in the opinion of the majority, although it looms so large in the background it should not be ignored. It is essentially that a group of subscribers has a perfect right to contract with some providers of medical services, as used in the broad sense, without contracting with all of them, under pain of conviction under the antitrust laws.

In general terms, physicians are a dedicated lot. By education, training, and inclination, they devote their adult lives to the physical care of others. While the same measure of devotion may be claimed, or even obtained, by

other providers, the same level of skill is not. Physicians are recognized, certainly by the Commonwealth of Virginia, and I suppose by every State, by the issuance of licenses to practice medicine, a recognition not accorded to any other provider of medical services. To say that the subscribers to Blue-Cross-Blue Shield may not contract with psychiatrists, who are physicians, for their services, without having a court compel a contract with psychologists, who are not physicians, to me is straining the antitrust laws beyond any imagined coverage that they might have.

Without necessarily equating the services of psychologists with those of psychiatrists, the result obtained by the majority is without support. I submit nothing in the record supports such an equation.

If a group of people (the subscribers) wish to contract at lower premiums for one medical service (physicians) without contracting with another (psychologists), I think they have a perfect right so to do, and if they wish to place special trust in the physicians to approve any other allied medical service, I think they have a perfect right to do that also. The antitrust laws simply are not intended to cover the fact situation at hand.

I would affirm.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 78-1883

CAROL MCCREADY, Individually and on behalf of all others similarly situated,
Appellant,

versus

BLUE SHIELD OF VIRGINIA, *et al,*
Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria
Albert V. Bryan, Jr., District Judge

Filed Jul. 2, 1981

The appellees' petition for rehearing and suggestion for rehearing en banc has been submitted to the Court. A poll of the Court was requested, and in the poll, a majority of the judges eligible to vote, voted to deny rehearing en banc.

The panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing en banc are DENIED.

Entered at the direction of Judge Butzner with the concurrence of Judge Thomsen (U.S.D.J.); Judge Widener dissents from the denial of rehearing by the panel and en banc for the reasons he set forth in his dissent to the panel opinion.

For the Court

/s/ William K. Slate, II
WILLIAM K. SLATE, II
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 78-1883

CAROL MCCREADY, Individually and on behalf of all others similarly situated,
Appellant,

versus

BLUE SHIELD OF VIRGINIA, BLUE SHIELD OF SOUTHWESTERN VIRGINIA, NEUROPSYCHIATRIC SOCIETY OF VIRGINIA, INC.,
Appellees,

and

MEDICAL SERVICE OF THE DISTRICT OF COLUMBIA, INC.,
Defendant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria
Albert V. Bryan, Jr., District Judge

Filed Jul. 8, 1981

Upon motion of the appellees, by counsel, and for cause shown,

IT IS ORDEDED that the mandate in the above-entitled case be, and it is hereby, stayed pending application of the appellees in the Supreme Court of the United States for a writ of certiorari to this Court.

The stay shall not exceed thirty (30) days unless the period is extended for cause shown.

For the Court—
by Direction

/s/ William K. Slate, II
WILLIAM K. SLATE, II
Clerk

APPENDIX E

* * * *

The McCarran-Ferguson Act: Sections 2 and 3(b) of the McCarran-Ferguson Act, 15 U.S.C. §§ 1012(a), (b) and 1013, provide as follows:

> Sec. 2(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.
>
> * * * *
>
> Sec. 3(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

Joint Appendix

Office - Supreme Court, U.S.
FILED
DEC 17 1981
ALEX

No. 81-225

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BLUE SHIELD OF VIRGINIA,
BLUE SHIELD OF SOUTHWESTERN VIRGINIA

and

NEUROPSYCHIATRIC SOCIETY OF VIRGINIA, INC.,
Petitioners,

v.

CAROL McCREADY

On Writ of Certiorari to The United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

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Petition for Certiorari Filed August 3, 1981
Certiorari Granted November 2, 1981

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UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

DOCKET

• • • • • • • • • • •

District: EDVa. at Alexandria

Number: 78-497-A

Judge: Albert V. Bryan, Jr.

Filed in D. C.: 07-14-78

Notice of Appeal: 10-09-78

Judgment: 10-10-78

Federal Prisoner ☐

State Prisoner ☐

Type Petition .....

*Title: CAROL MCCREADY, Individually and on behalf of all others similarly situated, *Appellant*,

vs.

BLUE SHIELD OF VIRGINIA, et al, *Appellees*

• • • • • • • • • • •

12-14-78—Record filed and appeal docketed. ses

12-18-78—Order (LR 19 multiple party) and establishing a briefing schedule, filed. Copies mailed. Appellant's brief due 1/23/79. ses

1/9/79—MOTION of appellee, Blue Shield of Va, for correction or modification of record and memorandum in support of the motion, filed. ecr

1/19/79—Appellant's opposition to motion of appellee for correction or modification of the record, filed. ecr

---

* HEW dissents.

1/22/79—ORDER denying motion of appellee, Blue Shield of VA, for correction or modification of record, filed. ecr

2/20/79—MOTION of appellees for extension of time to file brief to 2/26/79, filed. MOTION GRANTED. (fls)

5/17/79—MOTION (A-128) of appellees for stay or consolidate appeal, filed. (fls)

5/21/79—MEMORANDUM in support of appellees motion for stay etc. filed. plm

5/29/79—BRIEF of appellant in opposition to motion for stay, etc. filed. plm

6/12/79—ORDER denying motion of appellees to stay, etc., filed. (fls) Copy to Furr; Bloomfield; Ayers-Marshall; Klein; Prior; and Williams-Smith-Schill-Walsh-Schwarzschild-Ross.

10/9/79—MOTION (F-35) of appellees for leave to file supplemental post-argument BRF, filed (jeh)

10/22/79—MOTION (F-140) of A for leave to file response out of time, filed. MOTION GRANTED (jeh)

10/22/79—RESPONSE of A to appellees' motion to file supplemental post-argument BRF, filed (jeh)

10/22/79—MEMORANDUM of A in response to appelles' post-argument BRF, filed j Es' motion, supplemental brief for Es, A's response and memo transmitted to JDB, HEW, RCThomsen.

11/1/79—ORDER granting motion for leave to file Es' supplemental brief and the A's memorandum in response, filed. (fls) Copy to Furr-Bloomfield-Ayers-Marshall-Klein-Prior-Williams-Smith-Schill-Walsh-Schwarzschild-Ross.

11/1/79—SUPPLEMENTAL BRIEF for Es, filed. (fls)

5/26/81—PETITION FOR REHEARING (Z-205) and suggestion for rehearing en banc of Es, filed (jeh) Submitted to JDB, HEW, Judge Thomsen w/copy to entire court on 5/29/81

6/12/81—OPPOSITION of A to petition for rehearing and to suggestion for rehearing en banc, filed (jeh)

6/12/81—MOTION (A-88) of A, Carol McCready, for order directing that the man not be stayed pending disposition of the petition for rehearing filed (jeh)

6/16/81—Opposition to petition for rehearing, and motion A-88 submitted to JDB, HEW, Judge Thomsen w/copy to entire court

6/19/81—RESPONSE of Es, Blue Shield of Va. and Blue Shield of Southwestern Va. in opposition to motion A-88, filed (jeh) Submitted to JDB, HEW. Judge Thomsen w/copy to entire court on 6/23/81

6/29/81—ORDER denying motion of Carol McCready that the mandate not be stayed pending disposition of the pet. for reh., filed. (fsl) Copy to Furr; Bloomfield; Ayers-Marshall; Klein; Prior; Smith-Schill-Walsh-Schwarzschild.

7/2/81—ORDER denying petition for rehearing and suggestion for rehearing en banc of Es, filed (jeh) Copy to Furr; Bloomfield; Ayers-Marshall; Klein; Prior; Smith-Schill-Walsh-Schwarzschild

07/07/81—MOTION (B-28) of E's for stay of mandate filed. mjk

07/08/81—ORDER granting E's motion for stay of mandate filed. Copies to Smith/Schill/Walsh/Schwarzchild; Prior; Klein; Ayers/Marshall; Bloomfield; Furr. mjk

8/3/81—Notice evidencing the filing petition for writ of certiorari in Supreme Court August 3, 1981 filed. (No. 81-225) (jhl)

11/18/81—Certified copy of order of the Supreme Court granting certiorari November 2, 1981 filed.

DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

DOCKET ENTRIES

Date 1978	Nr.	Proceedings
Jul. 14	1	COMPLAINT together with JURY DEMAND—filed. jn
Jul. 14	—	SUMMONS (orig. & 4) issued and given to the Marshal for service. jn
July 24	2	MARSHAL'S return on summons executed 7/18/78 as to all defts.—filed.
Aug. 2	3	ORDER granting the defts. an extension of time within which to file an answer to the complaint to an including 8-28-78 entered—filed. Copies sent. (AVB) jn
Aug. 11	4	REQUEST for admission by deft. Medical Service of the District of Columbia—filed jw
Aug. 14	5	INTERROGATORIES to defts. Blue Shield of Va. & Blue Shield of Southwestern Va.—filed by pltf. bd
Aug. 28	6	NOTICE returnable 9-15-78 together with MOTIONS under Rules 12(b)(2), 12(b)(3), 12(b)(4) and 12(b)(5); MEMORANDUM in support of same; MOTIONS under Rule 12(b)(6); MEMORANDUM in support of same—filed by Deft. Blue Shield of SW Va. dj
Aug. 28	7	ANSWER—filed by deft. Med. Serv. of D.C., Inc. bd
Aug. 28	8	ANSWER—filed by deft. Neuropsychiatric Society of Va., Inc. bd

Date Nr. Proceedings

Aug. 28—9—NOTICE returnable 9-15-78 together with MOTION to dismiss; MEMORANDUM in support of same; MOTION to stay proceeding; MEMORANDUM in support of same—filed by Deft. BLue Shield of Virginia. dj

Aug. 29—10—OBJECTIONS to pltf's. interrogatories—filed by deft. Blue Shield of Southwestern Va. pn

Aug. 30—11—OBJECTIONS to pltf.'s interrogatories—filed by deft. Blue Shield of Virginia. jw

Sep. 1—12—NOTICE returnable 9-15-78 together with MOTION to stay proceeding; MOTION to dismiss; MEMORANDUM in support of Motion to Dismiss—filed by Deft. Neuropsychiatric Society of Va. dj

Sep. 3—13—PRETRIAL ORDER: (AVB) Discovery must be concluded by 11/10/78. Formal pretrial set for 11/16/78 at 4:20 pm.—entered & filed. Copies sent. (AVB) co

Sep. 11—14—ORDER extending pltf's. time within which to file responsive pleadings to various defensive motions to and including 9/15/78—entered & filed. Copies sent. (AVB)

Sep. 11—15—ANSWERS to pltf's. interrogatories—filed by deft. Blue Shield of Southwestern Va. pn

Sep. 11—16—MEMORANDUM in support of Motion for extension of time—filed by plft.

Sep. 11—17—MOTION for extension of time to file responsive pleadings up to and including 9/15/78—filed by pltfs. pn

Sep. 14—18—ANSWERS to pltf's. interrogatories—filed by deft. Blue Shield of Va.

Date Nr. Proceedings

Sep. 14—19—MOTION for pretrial coordination of proceedings to avoid unnecessary costs and delay; MEMORANDUM in support of same—filed by Pltf. d

Sep. 14—20—MOTION for a protective order to protect the privacy of Pltf. and members of the class proposed; MEMORANDUM of points and authorities in support of same—filed by Pltf. dj

Sep. 15—21—NOTICE returnable on Motion for pretrial coordination of proceedings to avoid unnecessary costs and delay; Motion for a Protective Order—filed by Pltfs. dj (See C/A 78-496-A)

Sep. 15—22—MEMORANDUM in Opposition to Blue Shield Deft's. Motion to stay, or in the alternative, to dismiss on abstention, exhaustion and other grounds—filed by Pltfs. dj (See C/A 78-496-A)

Sep. 15—23—MEMORANDUM in Opposition to Deft. Blue Shield of SW Va.'s Motions to dismiss on venue and personal jurisdiction grounds—filed by Pltfs. dj (See C/A 78-496-A)

Sep. 15—24—MEMORANDUM in Opposition to Deft. Blue Shield's Motion to dismiss these actions on Rule 12(b)(6), Standing & McCarran-Ferguson Act grounds—filed by Pltfs. dj (See C/A 78-496-A)

Sept. 18—25—NOTICE to take deposition of Jane Doe—filed by deft Blue Shield of Va. rw

Sep. 18—26—REQUEST for admissions—filed by Blue Shield of Southwestern VA. co

Date Nr. Proceedings

Sep. 18—27—ANSWER—filed by deft. Blue Shield of Southwestern Va. jn

Sep. 18—28—ANSWER—filed by deft. Blue Shield of Va. pn

Sep. 22—29—RESPONSE of deft. Neuropsychiatric Society to pltfs memorandum in opposition to NSV's Motion to dismiss—filed. rw

Sep. 25—30—SECOND REQUEST to Pltf. for the production of documents—filed by Deft. Blue Shield of Va. dj

Sep. 25—31—FIRST SET of Interrogatories to Pltf.—filed by Deft. Blue Shield of Va. dj

Sep. 25—32—MOTION and MEMORANDUM in Opposition to Pltf's Motion for Protective Order—filed by Deft. Blue Shield of SW Va. dj

Sep. 25—33—MEMORANDUM in Opposition to Pltf's. Motion for Pretrial coordination of proceedings—filed by Deft. Blue Shield of SW Va. dj (See C/A 78-496-A)

Sep. 26—34—RESPONSE to deft. Blue Shield of Virginia's request for production of documents—filed by pltf. co

Sep. 26—35—REPLY MEMORANDUM relating to Motions to Dismiss under Rule 12(b)(6)—filed by Deft. Blue Shield of S.W. Va. dj (See 78-496-A)

Sep. 36—36—REPLY MEMORANDUM relating to Rules 12(b)(2) & 12(b)(5) Motions—filed by Deft. Blue Shield of S.W. Va. dj (See 78-496-A)

Sep. 27—37—NOTICE returnable 9-29-78 together with MOTION to compel discovery; MEMORANDUM in support of same—filed by Deft. Blue Shield of Virginia. dj

Date Nr. Proceedings

Sep. 27—38—MEMORANDUM in Opposition to Pltf's. Motion for protective order—filed by Deft. Blue Shield of Virginia. dj

Sep. 27—39—REPLY MEMORANDUM to Pltf's. Memorandum in Opposition to Deft's Motion to dismiss—filed by Deft. Blue Shield of Va. dj (78-496-A)

Sep. 28—40—REPLY MEMORANDUM to Pltf's. Memorandum in Opposition to Deft's. Motion to Stay—filed by Deft. Blue Shield of Va. dj

Sept. 29—41—AFFIDAVIT of M. Roy Battista filed. tb

Sept. 29— —TRIAL PROCEEDINGS: J. Bryan. This matter came on for hearing on Mots. Appearances of counsel. Deft. Blue Shield of SW Va. motion under Rule 12 (b) (2) thru 12 (b) (6) argued and granted as to 12(b) to (5). Pltfs. motion for protective order argued and denied as to Pltfs. Identity. Pltfs. motion for pretrial coordination arg. and granted. All other motions were argued and taken under advisement. Order to follow. tb

Oct. 2—42—RESPONSE to requests for admission of deft. Medical Service of D.C.—filed by the pltf. jn

Oct. 2—43—FIRST set of interrogatories propounded to the pltf.—filed by the deft. Blue Shield of S.W. Va. jn

Oct. 4—44—NOTICE of taking the deposition of Medical Society of Va., Inc.—filed by the pltf. jn

Oct. 4—45—PROTECTIVE ORDER that the pltf. Jane Doe not be permitted to proceed under a fictitious name and that she amend her complaint in 5 days to disclose her identity, etc.; counsel

Date Nr. Proceedings

is directed to transmit copies of this Order to their clients and advise them of it—entered & filed. Copies sent. (AVB) bd

Oct. 5—46—ORDER consolidating this cause with C/A 78-496-A for pretrial discovery purposes—entered & filed. Copies sent. (AVB) bd

Oct. 5—47—ORDER denying motions of deft. Blue Shield under Rules 12(b)(2)(3)(4) and (5)—entered & filed. Copies sent. (AVB) bd

Oct. 6— —DEPOSITION of Jane Doe—received. jw

Oct. 6—48—RESPONSE to requests for admission of Blue Shield of Southwestern VA—filed by Pltf. co

Oct. 10—49—RESPONSE to deft. Blue Shield of Virginia "First" Request for production of documents to pltfs.—filed. jw

Oct. 10—50—RESPONSE by pltfs. Virginia Academy of Clinical Psychologists and Resnick to deft. Blue Shield of Virginia's "second" request for prodcution of documents—filed. jw

Oct. 10—51—RESPONSE by pltf. Jane Doe to Blue Shield of Virginia "second" document request—filed. jw

Oct. 10—52—NOTICE of taking deposition of James L. Gore —filed by pltf. jw

Oct. 10—53—NOTICE of taking deposition of John Mullaney, M. D.—filed by pltf.

Oct. 10—54—RE-NOTICE of taking deposition of M. Roy Battista—filed by pltf.

Oct. 10—55—MEMORANDUM OPINION—filed. (AVB) bd

Date Nr. Proceedings

Oct. 10—56—Order in accordance with the Memo. Opinion dismissing C/A 78-497-A; denying defts. motions to dismiss C/A 78-496-A; deft. Blue Shield of Virginia's motion for a protective order and pltf's motion to compel discovery are granted in part and denied in part in 78-49 discovery time period is fixed at from and after 1-1-72; deft. Blue Shield of Virginia's motion to compel discovery in 78-497-A is denied—ent. & filed. Copies sent. (AVB) bd

Oct. 10—57—Motion for enlargement of time in which to respond to certain interrogatories propounded by the defts. Blue Shield of Va. & Neuropsychiatric Society of Va.—filed by pltfs. bd

Oct. 10—58—Third request for production of documents to deft. Va. Academy of Clinical Psychologists —filed by deft. Blue Shield of Va. bd

Oct. 11—59—Amended Complaint—filed. (jury demand) bd

Oct. 11—60—Notice returnable 11-3-78 with Motion for Summary Judgment—filed by deft. Med. Serv. of D.C. bd

Oct. 11—61—Brief in support of Motion for Summ. Judg.—filed by deft. Med. Serv. of D.C. bd

Oct. 11—62—First Interrogatories of deft. Med. Serv. of the Dist. of Col. to pltf.—filed. bd

Oct. 20—63—Notice of taking deposition of Norwood H. Davis, Jr.—filed by pltf.

Oct. 20—64—Notice of taking deposition of Wm. L. Bauman, Jr., James R. Blackwell and Robt. C. Ingram—filed by pltfs.

Date Nr. Proceedings

Oct. 20—65—NOTICE of taking deposition of Alden E. Flory filed by pltfs. bd

Oct. 24—66—MOTION for independent physical and mental examination of pltf. tog. with MEMORANDUM in support of (COPY)—filed by Blue Shield of Virginia (Filed at request of counsel for pltf. jw SEE letter dated 10-20-78

Oct. 27—67—LETTER in response to letter dated 10-20-78—filed. je (See Letter)

Nov. 9—68—NOTICE of appeal of Order of 10/10/78—filed by pltf. Copies sent. ms

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 78-496-A

VIRGINIA ACADEMY OF CLINICAL PSYCHOLOGISTS, *et al.*,
Plaintiffs,

v.

BLUE SHIELD OF VIRGINIA, *et al.*,
Defendants.

Civil Action No. 78-497-A
JANE DOE,
Plaintiff,

v.

BLUE SHIELD OF VIRGINIA, *et al.*,
Defendants.

MEMORANDUM OPINION

Following the argument on the pending motions in these actions on September 29, 1978, the Court made the following rulings from the bench:

(1) The two actions were consolidated for the purpose of pretrial discovery.

(2) The plaintiff Jane Doe's motion for a protective order precluding the public disclosure of her real name in depositions, interrogatories and in her action generally was denied.

(3) The defendants' motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(2), 12(b)(3), 12(b)(4) and 12(b)(5) were denied.

(4) Defendant Blue Shield of Virginia's (BS Va) motion for a protective order restricting dissemination of documents or information, which defendants designate as confidential because the documents involve trade secrets or confidential commercial or financial information, to counsel for the plaintiffs or their designated expert, was granted.

Reserved for decision were the following:

(1) Defendants' motion to stay the proceedings or dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

(2) Defendant BS Va's motion for a protective order insofar as certain document requests were concerned.

(3) Plaintiffs' motion for production of documents by BS Va.

(4) Plaintiffs' motion for establishment of time period and discovery guidelines.

(5) Defendant BS Va's motion to compel discovery.

12(b)(6) Motions

The defendants' grounds for these motions are as follows:

(1) That the plaintiff Virginia Academy of Clinical Psychologists (VACP) lacks standing to bring a federal antitrust action.

(2) That the plaintiff, Jane Doe, also lacks such standing.

(3) That the defendants are exempt from the federal antitrust laws by the McCarran-Ferguson Act.

(4) That the plaintiffs have failed to exhaust their administrative remedies.

(5) That the plaintiffs have not adequately pleaded a federal antitrust claim upon which relief can be granted.

(6) That the part of the complaint which alleges violations and damages arising prior to July 14, 1974 (four years prior to the time the action requesting damages was filed) should be dismissed as time barred by 15 U.S.C. § 15b (1976).[1]

(7) That, insofar as the defendant Neuropsychiatric Society of Virginia (NSV) is concerned, application of the antitrust laws to it for the conduct alleged would amount to an abridgement of NSV's first amendment right of free speech.

A brief background of the actions is helpful. The complaint reveals that the defendants in the actions are three Blue Shield Programs operating in Virginia, Medical Services of D.C. and the Neuropsychiatric Society of Virginia. The plaintiffs are VACP, a voluntary association representing clinical psychologists, and Dr. Robert J. Resnick, a clinical psychologist, in the one case, and Jane Doe, who has received the services of a Virginia clinical psychologist, in the other. They allege that the denial of direct reimbursement to clinical psychologists for their services amounts to a conspiracy in violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1976).[2]

---

[1] "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections." 15 U.S.C. § 15b (1976).

[2] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal contracts or agreements prescribing minimum

VACP and Dr. Resnick sue pursuant to section 16 of the Clayton Act, 15 U.S.C. § 26 (1976),[3] and seek declaratory and injunctive relief. Jane Doe and her class, all subscribers to contracts for prepaid medical or related services with the defendants other than NSV, seek treble damages pursuant to section 4 of the Clayton Act, 15 U.S.C. § 15 (1976).[4] She alleges that she and her class

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prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 15 U.S.C. § 1 (1976).

[3] "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . ." 15 U.S.C. § 26 (1976).

[4] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue

have been denied reimbursement for fees paid to clinical psychologists as a result of the denial of coverage for direct (as opposed to through a psychiatrist) psychological services.[5]

The grounds of the 12(b)(6) motions will be discussed in order:

(1) The defendants argue that VACP lacks standing because no injury to VACP, as distinguished from its members, is alleged to VACP. This is true; that plaintiff, however, purports to bring the action on behalf of its members. The relief sought is injunctive and declaratory only under section 16 of the Clayton Act and individual participation of each allegedly injured party is not necessary for proper resolution of the action. *Warth* v. *Seldin*, 422 U.S. 490, 511 (1975). In *South Carolina Council of Milk Prod., Inc.* v. *Newton*, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966), the Fourth Circuit apparently assumed representative standing was proper even in a section 4 action, although the issue was not specifically addressed. Upon consideration of the allegations of this complaint, VACP has standing.

(2) Jane Doe's standing depends upon whether her injury was suffered within the sector of the economy competitively endangered by the defendants' alleged violations of the antitrust laws. *Reiter* v. *Sonotone Corp.*, [1978] Trade Cases ¶ 62,098 (8th Cir. June 19, 1978); *John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495 (9th Cir. 1977); *GAF Corp.* v. *Circle Flour Co.*, 463 F.2d 752 (2d Cir. 1972) *cert. dismissed*, 413 U.S. 901

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therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15 (1976).

[5] Jane Doe also has a pendent claim of breach of contract.

(1973); *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122 (9th Cir. 1973); *Calderone Enterprises, Inc.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971) *cert. denied*, 406 U.S. 930 (1972); and *South Carolina Council of Milk Prod., Inc., supra.*[6] The Court concludes that the sector of the economy *competitively* endangered by a violation by the defendants goes no further than that area occupied by the psychologists.[7] They are the ones allegedly being boycotted, not Jane Doe. Jane Doe, operating in a market which is unrestrained *insofar as she is concerned*,[8] may have suffered an injury by being unable to collect insurance from one of the defendants, but this injury is too indirect and remote to be considered "antitrust injury." *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972), and *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), also seem to support a limited standing doctrine, although the latter case was decided in the context of a section 7 action. See generally Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term —1977*, 77 Colum. L. Rev. 979, 989 (1977). While standing and antitrust injury may or may not be treated as the same issue, in this case Jane Doe does not have the former because she has not sustained the latter. Accordingly, her complaint must be dismissed.

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[6] Unlike the situation in *South Carolina Council of Milk Prod.* v. *Newton, supra*, which held that a nonspecific complaint of antitrust injury was sufficient to compel a trial on the merits to see if such injury was proximately caused by the alleged violation, here we know from the complaint exactly what injury is alleged.

[7] This determination of the sector of the economy competitively endangered establishes, in the Court's view, the standing of the individual plaintiff Resnick in the section 16 action.

[8] There is no suggestion that the plaintiff Jane Doe cannot obtain insurance coverage for psychological treatment from insurance carriers other than the defendant providers, although there is an allegation that the defendant providers are dominant in the field.

The Court further concludes that in the exercise of its discretion Jane Doe's pendent breach of contract claim should also be dismissed, since no independent jurisdictional ground for its maintenance exists.

(3) The answer to whether the Blue Shield defendants, because they conduct insurance businesses, are exempt from the antitrust laws by virtue of the McCarran-Ferguson Act was, in the Court's view, decided by *Ballard v. Blue Shield of Southern W. Va., Inc.*, 543 F.2d 1075, 1078 (4th Cir. 1976). In *Ballard*, the Fourth Circuit found that Blue Shield's refusal of health insurance coverage for chiropractic services fell within the exemption of the McCarran-Ferguson Act,[3] subjecting insurance companies who have participated in such "boycotts" to the antitrust laws. 543 F.2d at 1078. In the present case a boycott of psychologists is sufficiently alleged in the complaint to meet the exception to the Act contained in 15 U.S.C. § 1013(b) (1976).

(4) The short answer to the defendants' argument that plaintiffs have failed to exhaust their administrative remedies is that there is no administrative remedy available which will give plaintiffs the relief they seek. The question is of course moot insofar as Jane Doe is concerned since the Court has concluded that she lacks standing to bring a federal antitrust action. Yet it is obvious that the Virginia State Corporation Commission (SCC), the body to which the defendants say plaintiffs should look for relief, would have had no jurisdiction to award her treble damages. Insofar as the other plaintiffs are concerned, the SCC does have jurisdiction to determine whether the defendants are complying with state law and regulations and to examine the constitu-

[3] ". . . Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation." 15 U.S.C. § 1013(b) (1976).

tionality of those enactments. *Blue Cross of Virginia* v. *Commonwealth of Va.*, —— Va. ——, 239 S.E.2d 94 (1977). The violation of state law, however, is only part of plaintiffs' claim; and the SCC would have no jurisdiction to determine whether the defendants had conspired to injure the plaintiffs or to grant injunctive relief against such a conspiracy. Apparently the SCC has under consideration the constitutionality of Va. Code Ann. 32-195.10:1 (Cum. Supp. 1978).[10] Some of the defendants are before the SCC urging that the section is unconstitutional. Should they prevail in this assertion, plaintiffs' prayers for relief remain unanswered. Should they not prevail, the plaintiffs are still unrelieved.

(5) Mindful of the admonition of higher courts that complex antitrust claims should rarely be decided on motion, *cf. Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 473 (1962), the Court concludes that the antitrust violations have been adequately pleaded. The defendants are given fair notice of the plaintiffs' claim that plaintiffs, as psychologists, are being boycotted as providers of covered services as a result of the defendants' concerted action. This is sufficient. *Conley* v. *Gibson*, 355 U.S. 41 (1957). Nor is the Court persuaded by the 1934 case of *Glenn Coal Co.* v. *Dickinson Fuel Co.*, 72 F.2d 885 (4th Cir. 1934), cited by the defendants, that at

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[10] "No plan for furnishing prepaid medical and surgical, and similar or related services, or any of such services, shall fail or refuse, either directly or indirectly, to allow or to pay for such services, or any part thereof, rendered by any doctor of podiatry, doctor of chiropody, or optometrist, optician and psychologist duly licensed to practice in Virginia, to the holder of any contract or subscription contract issued under or pursuant to such plan if the services rendered (a) are services provided for by such contract or subscription contract and (b) are services which the doctor of podiatry, doctor of chiropody or optometrist, optician and psychologist is licensed to render in Virginia." Va. Code Ann. 32-195.10:1 (Cum. Supp. 1978).

this late date we should revert to the technical rules of pleading which were formerly prevalent.

(6) The argument that portions of the relief sought are time barred seems principally addressed to the section 4 damage claims of Jane Doe—now rendered moot. To the extent that the argument is addressed to the complaint for injunctive and declaratory relief, no striking of the complaint is warranted. Activities which predate the limitation period may well be relevant to the existence of unlawful conduct within that period.

(7) NSV's assertion is that it is being sued because of its willingness to take a position on an issue of major public concern—namely, the appropriate extent of coverage of pre-paid health plans—and to communicate that position to interested parties. A denial of such a right would, NSV asserts, abridge its first amendment right of free expression. And it would indeed do so if that is all that NSV has done; and in that event there could be no relief awarded against NSV for violation of the federal antitrust laws. But this is a defense on the merits. As adequately pleaded, NSV shares the complicity of the other defendants in concerted activity to boycott the plaintiffs. Such an assertion is sufficient to survive a 12(b)(6) motion to dismiss.

Motion to Stay

The grounds for defendants' motions to stay are twofold: *first*, because of *Group Life & Health Insurance Co.* v. *Royal Drug Co., cert. granted*, 46 U.S.L.W. 3541 (1978), presently pending before the Supreme Court, a decision which the defendants believe will be dispositive of the issues in this action; and *second*, because of the pending SCC proceeding involving some of these defendants.

Insofar as the pendency of *Royal Drug* is concerned, it is extremely doubtful that a decision in that case will

resolve the issues here. No question concerning a boycott is presented in *Royal Drug*. Consequently, *Ballard* v. *Blue Shield of Southern W. Va., supra*, would govern the applicability of the McCarran-Ferguson Act to the instant action. Since *Ballard*, as indicated previously, holds that boycotts of the type here alleged are not protected by McCarran-Ferguson, there is no need to delay the progress of these actions.

The facts concerning the pendency of the proceeding before the SCC are apparently these: that case began on April 22, 1977 when the SCC (a regulatory body and a court of record) issued an order compelling Blue Cross and Blue Shield of Virginia to show cause why the SCC should not declare void all their subscriber contracts approved by the Virginia Bureau of Insurance which are contrary to Va. Code Ann. § 32-195.10:1, *supra* n. 10. This statute, as amended in 1973, prohibits the refusal to reimburse for otherwise-covered services rendered by, among others, psychologists licensed in Virginia to render such services. Blue Cross and Blue Shield concede they are not in compliance with § 32-195.10:1 since, with certain minor exceptions, they do not reimburse for services rendered by psychologists unless such services are performed under the supervision of a licensed physician. As their only defense to the show cause order, Blue Cross and Blue Shield assert that § 32-195.10:1 does not represent a valid or proper exercise of the police power of the Commonwealth of Virginia and is void and unenforceable under both the Constitution of the United States and the Constitution of Virginia. The question of the statute's constitutionality, being a mixed question of law and fact and the only issue in those proceedings, is set for hearing January 22-25, 1979.

Previously, on July 15, 1977, the SCC, finding it had no jurisdiction to decide the constitutionality of § 32-195.10:1, denied the motion to dismiss and declared void

all provisions of Blue Cross' and Blue Shield's subscriber contracts contrary to the statute. On appeal, the Supreme Court of Virginia reversed the SCC's July 15, 1977 order and remanded the case for determination of the constitutionality of the statute. *Blue Cross of Virginia* v. *Commonwealth of Va., supra.* Having intervened in the proceeding, the Virginia Attorney General then moved the SCC for summary judgment, asserting that § 32-195.10:1 is in fact constitutional and valid. Relying upon both written memoranda and oral argument, the SCC denied the motion for summary judgment.

Defendants rely on the doctrines of primary jurisdiction and abstention to support a stay pending the outcome of the SCC proceeding. Insofar as primary jurisdiction is concerned they cite as controlling authority *Carter* v. *Am. Tel. & Tel. Co.*, 365 F.2d 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967). There, in a private antitrust action, a tariff was allegedly used and enforced by the defendants to accomplish a violation of the federal antitrust laws. The court held that primary jurisdiction was vested in the Federal Communications Commission (FCC) to determine the justice, reasonableness, validity and effect of the tariff. Consequently, the circuit court upheld the district court's reference of the question of the tariff's validity to the FCC since the circuit court concluded that the validity of the tariff was at the core of the plaintiff's antitrust claim; the resolution of the question of this validity would determine all or a principal part of the action; and the FCC would hardly uphold a tariff that was brought into existence by concerted action motivated by a monopolistic aim, as opposed to an aim of improving or maintaining telephone service. Quite the opposite is true here. The SCC's sole inquiry is the constitutionality of Va. Code § 32-195.10:1. It cannot inquire into the motives that brought that enactment into being. The validity of the section is not at the center of plaintiffs' claim. If the SCC upholds its

constitutionality, it merely means the defendants have been violating the law for five years since the defendants concede they have not adhered to it. It will not, however, determine whether the defendants have violated the federal antitrust laws. If the section is found unconstitutional the plaintiffs' actions will go forward. Moreover, as pointed out before, plaintiffs' claim does not rely solely on this statute.

For the same reasons just discussed, abstention is not appropriate. Awaiting a decision by the SCC (and presumably the final resolution of the issue on appeal) will accomplish no economy in judicial or party energies. Nor are other factors present, such as the mooting of a federal constitutional claim by a state resolution of an issue on other grounds, which could invoke abstention. A stay on the grounds suggested by defendants would be evading the responsibility and obligation of the federal courts to exercise the jurisdiction given them. *Colorado River Water Constr. District* v. *United States*, 424 U.S. 800 (1976).

The motion to stay will therefore be denied.

Plaintiffs' Motion for Production of Documents and Defendants' Motion for a Protective Order

Plaintiffs' motion requesting that defendants comply with the request for production of documents contained in Paragraphs 5, 7, 10, 11 and 17 of plaintiffs' request filed with the complaint will be granted since those documents could well lead to relevant evidence of an agreement among the defendants. The request contained in Paragraph 18 will be denied since the production and examination of the many, many files involved would be unduly burdensome and would be unlikely to lead to relevant evidence.

Plaintiffs' Motion for
Establishment of Deadlines

Discovery of documents and answers to interrogatories will not be limited to four years prior to the time the actions were filed. Although this time period may be applicable when the Court considers any actual misconduct on defendants' part, activities prior to that time may well lead to relevant information concerning conduct within the four year period. Accordingly, discovery will be allowed for information and documents available or in existence from and after January 1, 1972.

BS Va's Motion to Compel Discovery

Since this motion concerns Jane Doe in the section 4 action, it will be dismissed as moot.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
October 10th, 1978

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1883

CAROL MCCREADY, individually and on behalf of all others similarly situated,
Appellant,

v.

BLUE SHIELD OF VIRGINIA;
BLUE SHIELD OF SOUTHWESTERN VIRGINIA;
NEUROPSYCHIATRIC SOCIETY OF VIRGINIA, INC.
Appellees,

and

MEDICAL SERVICE OF THE DISTRICT OF COLUMBIA, INC.,
Defendant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria
Albert V. Bryan, Jr., District Judge

Argued October 4, 1979 Decided May 12, 1981

Before BUTZNER and WIDENER, Circuit Judges,
and THOMSEN, Senior District Judge*

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* United States District Court for the District of Maryland, sitting by designation.

Timothy J. Bloomfield (Alan J. Kriegel, Dunnells, Duvall, Bennett & Porter; Warwick R. Furr, II, Lewis, Mitchell & Moore, on brief) for Appellant; R. Gordon Smith (James H. Walsh, McGuire, Woods & Battle; Ronald M. Ayers, Heman Marshall, Woods, Rogers, Muse, Walker & Thornton; Joel I. Klein, Eugene Comey, Rogovin, Stern & Huge; Francis J. Prior, Jr., Siciliano, Ellis, Sheridan and Dyer, on brief) for Appellees.

THOMSEN, Senior District Judge:

Carol McCready brought this action in the United States District Court for the Eastern District of Virginia, claiming that defendants Blue Shield of Virginia, Blue Shield of Southewestern Virginia, Medical Services of the District of Columbia (collectively, Blue Shield) and the Neuropsychiatric Society of Virginia participated in an unlawful combination and conspiracy to exclude clinical psychologists from receiving compensation under Blue Shield's prepaid health care plans in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 [1] and Section 4 of the Clayton Act, 15 U.S.C. § 15.[2] McCready brought the case as a class action on behalf of all Blue Shield subscribers in Virginia who incurred costs for psychological services since 1973 but who were

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[1] § 1 of the Sherman Act provides in part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . . .

[2] § 4 of the Clayton Act provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in the district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

not reimbursed for those costs under the applicable health care plans of Blue Shield. She sought treble damages and attorney's fees as provided by the antitrust laws. The district court dismissed her complaint on the grounds that McCready had no standing to bring such an action and had suffered no antitrust injury because her injury was not suffered within the sector of the economy endangered by defendants' alleged violations of the antitrust laws.[3]

From September 1975 until January 1978, McCready, an employee of Prince William County, Virginia, was a subscriber to one of the health care plans administered by Blue Shield. The county provided its employees group coverage purchased from Blue Shield of Virginia. That group plan provided for reimbursement to subscribers for treatment by psychiatrists, or by psychologists whose services were supervised and billed by a treating physician. No reimbursement was allowed for treatment by psychologists unless billed through a treating physician.

During the period of her health care coverage through Blue Shield, McCready received treatment from a clinical psychologist. She unsuccessfully sought reimbursement of those bills from Blue Shield.[4] In 1978, she brought this action, claiming a conspiracy by defendants to boycott psychologists, which she alleged was effectuated by Blue Shield's refusal to reimburse its subscribers for costs of psychological services because those services were rendered and billed by a psychologist and not by a physician.

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[3] McCready also sought relief through the court's pendant jurisdiction, on a breach of contract claim. The dismissal of the pendant claim is not before us on appeal.

[4] McCready was mistakenly paid $128.00 by Blue Shield after submission of claims for psychological services. Once the error was discovered, Blue Shield sought to obtain a refund from McCready of that amount.

The alleged conspirators are the Blue Shield defendants, listed above (all of which are separate non-stock corporations engaged in the business of health care plans), Neuropsychiatric Society of Virginia, a not-for-profit non-stock corporation whose members are psychiatrists practicing in Virginia, and other unnamed co-conspirators. By agreement among themselves, it was alleged, those parties sought to exclude psychologists from reimbursement coverage under Blue Shield's contracts in the State of Virginia.

A related action was filed in the same district court by the Virginia Academy of Clinical Psychologists (VACP), and the two cases were consolidated for pretrial discovery purposes. Motions to dismiss were filed by the defendants in each case and were heard together.

The district court granted the motion to dismiss the case now before us on appeal, but denied the motion to dismiss the VACP case.

In its opinion granting defendants' motion to dismiss the instant case, the district court concluded that "the section of the economy *competitively* endangered by a violation by the defendants goes no further than that area occupied by the psychologists." (Emphasis in original) Therefore, it reasoned, McCready was "operating in a market" which was "*unrestrained insofar as she is concerned;*" and her injury was "too indirect and remote" to be an antitrust injury. The district court also stated that "[w]hile standing and antitrust injury may or may not be treated as the same issue, in this case Jane Doe [McCready] [5] does not have the former because she has not sustained the latter." As a result, the district court dismissed McCready's complaint because of lack of standing to sue.

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[5] McCready brought this action under the pseudonym "Jane Doe," but the district judge required her to disclose her true name.

The VACP case went to trial on the merits and resulted in a judgment for defendants. *Virginia Academy, etc.* v. *Blue Shield of Virginia*, 469 F. Supp. 552 (E.D. Va. 1979). That judgment was affirmed in part, vacated and remanded in part, by another panel of this court, No. 79-1345, —— F.2d —— (June 16, 1980), which should be read in connection with this opinion, although it did not deal with all the issues presented by this appeal.

McCready contends that she not only has suffered a property injury within the meaning of the antitrust laws but that her injuries were suffered by reason of the antitrust violations alleged. Since McCready appeals the granting of defendants' motion to dismiss, we take as true all facts well pleaded in her complaint.

The Clayton Act provides that an antitrust plaintiff must have been injured in his "business or property," and further, that such injury must result by reason of something "forbidden in the antitrust laws."

McCready's contention, that consumers who have suffered non-commercial monetary injury as a result of an antitrust violation have been injured in their property within the meaning of the Clayton Act, was decided favorably to her position by the Supreme Court in *Reiter* v. *Sonotone Corp.*, 442 U.S. 330 (1979), after the district court had entered its order. The district court, however, did not rely on the fact that her claimed injury was non-commercial in dismissing the complaint.

The plaintiff in *Sonotone* was a consumer who alleged that as a result of antitrust violations, including horizontal and vertical price-fixing, she was forced to pay an artificially high price for a hearing aid. She brought a class action against the hearing aid manufacturers. The district court certified for interlocutory review the issue of consumer standing. In reversing the decision of

the Court of Appeals denying such standing, the Supreme Court held that "[a] consumer whose money has been diminished by reason of an antitrust violation has been injured 'in his . . . property' within the meaning of § 4 [of the Clayton Act]". Id. at 339. Therefore, Reiter's allegation of financial loss because she paid a higher price as a result of Sonotone's anti-competitive conduct was sufficient to make out an injury to her "property" within the meaning of § 4 of the Clayton Act.

McCready can no longer be denied standing simply because she is a consumer with a non-commercial monetary loss. *Sonotone*, however, is not dispositive of all of the issues here. The consumer still must prove that her injury resulted from an antitrust violation.

Although the ultimate goal of the conspiracy alleged by plaintiff was the exclusion of clinical psychologists from a large segment of the market, the direct victims of the conspirators include McCready and the class of similarly situated patients whom she seeks to represent, as well as the clinical psychologists; both were in the target area. The complaint alleges that the conspirators exclude psychologists by making it too expensive for Blue Shield subscribers to consult them. This is accomplished by Blue Shield's refusal to reimburse a subscriber for the services of a psychologist unless the patient also consulted a physician. In contrast, Blue Shield would reimburse a subscriber who received similar treatment from a psychiatrist without further consultation. McCready alleges that as a result of the conspiracy, Blue Shield denied her reimbursement for sums she paid for treatment when she consulted a psychologist instead of a psychiatrist.

Section 4 of the Clayton Act affords relief to "[a]ny person . . . injured in his . . . property by reason of anything forbidden in the antitrust laws . . . ." By its terms the Act does not restrict standing to competitors

who are the targets of anticompetitive behavior. *Sonotone*, supra. It encompasses "any person" whose property loss is directly or proximately caused by violation of the law. See *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F.2d 414, 417 (4 Cir. 1966). McCready satisfies these requirements. Her injury was immediate and direct. Although denial of reimbursement was designed to divert her and other subscribers from psychologists to psychiatrists, this goal does not make her loss too remote or indirect to be covered by the Act.

Use of the catch words "target area" is convenient to deny standing, but it can be justified only when the underlying purposes of the phrase are served. It is generally recognized that the target area test for denial of standing serves two purposes. First, it bars suits by persons whose damages are speculative and difficult to prove. See *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit*, 454 F.2d 1292, 1295 (2 Cir. 1971). This reason for denying standing does not apply to McCready. Her damages can be readily ascertained to the penny; they are her reimbursable costs of treatment. These are fixed by her Blue Shield contract as 80% of the amount she paid the psychologist.

The second purpose of the target area is the prevention of multiple recoveries by different plaintiffs against the same defendants for a single injury. *Ames* v. *American Telephone & Telegraph Co.*, 166 F. 820, 823 (C.C.D. Mass. 1909). The second reason for denying standing also does not apply to McCready. There can be no double recovery. She has already paid her psychologist's bills; the psychologist suffered no damage in this respect. Although McCready is a consumer and not a competitor, her allegations of direct pecuniary loss by reason of antitrust violations are sufficient to confer standing. *Sonotone, supra; South Carolina Council of Milk Producers*, supra.

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The judgment of the district court is reversed and the case is remanded for further proceedings to determine the propriety of certifying the class and the merits of plaintiff's claim as alleged in her complaint.

REVERSED AND REMANDED WITH INSTRUCTIONS.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

I

My first point of dissent with the majority is upon its construction and application, or non-application strictly speaking, of the target area rule.

The majority proceeds upon an erroneous factual premise and then follows up that error. The erroneous premise is found on page 10 of its opinion, and is as follows:

> "Although denial of reimbursement was designed to divert her [Miss McCready] and other subscribers from psychologists to psychiatrists, this goal does not make her loss too remote or indirect to be covered by the Act."

The difficulty with the statement is that Miss McCready did not plead or otherwise show that any alleged conspiracy was either "designed to divert her" from a psychologist to a psychiatrist, or that any such "goal" existed. The nearest thing in her pleadings to the factual premise relied upon by the majority is that "as a further consequence of the acts and practices described hereinabove: . . . patients have been economically coerced to receive psychological services from psychiatrists rather than clinical psychologists. . . ." Thus, even the plaintiff does not describe her injury as a design or goal of any antitrust violation, rather as a consequence thereof.

It is just such a difference that the target area rule applies to.

While referring to our case of *South Carolina Council of Milk Producers* v. *Newton*, p. 417, as support for the proposition that any person whose property loss is directly or proximately caused by violation of law has

standing to sue, the majority neglects to give any effect to *Newton*, p. 419, that if the injury to the plaintiff is only incidental or consequential, or if t[illegible]laintiff is so removed from defendants' acts that his [illegible]ury is only remotely caused by defendants' antitrust actions, then the plaintiff is not injured by reason of anything forbidden in the antitrust laws. It is this restriction on coverage which was not altered by *Sonotone*, I submit, and my conclusion is verified by the other circuits which have considered the matter since that case.

As just stated, we have spoken to the issue of injury by reason of an antitrust violation in *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F.2d 414 (1966). There a group of milk producers brought an action under the antitrust laws against wholesale and retail grocers, alleging that their conspiracy to sell milk at unreasonably low prices resulted in an unlawful diversion of the milk trade to the defendants, with a resulting threatening of the economic existence of the milk industry in South Carolina. The district court granted summary judgment for the defendants on the ground that there was no privity of contracts or direct competition to result in a direct injury actionable under the antitrust laws.

This court reversed, holding that § 4 does not limit relief to persons with a direct contractual or competitive relationship with those charged with an antitrust violation. A cause of action under § 4 of the Clayton Act, we held, is not dependent upon a contractual or competitive relationship between the parties. All a plaintiff must show to have standing to sue under § 4 is that he is "within the sector of the economy in which the violation threatened a breakdown of competitive conditions and that he was proximately injured thereby. . . ." *Newton* at 418. The court cautioned, however, that if the injury to the plaintiff is only incidental or

consequential or if the plaintiff is so removed from the defendant's acts that his injury is only remotely caused by defendant's antitrust actions, then the plaintiff is not injured by reason of anything forbidden in the antitrust laws.

This is what is called the "target area" test which has been followed by a number of circuits,[1] as well as our own, and which I think cannot be explained away largely by a description of the rule as "catch words." It was thoroughly discussed by the Ninth Circuit in *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358 (1955), relied upon by this court in *Newton.* There a manufacturer of car wax was allowed to sue *Richfield Oil*, a producer of petroleum products, which had entered into agreements with independent service station operators who sold Richfield Oil products for the exclusive selling of certain auto accessories, including car wax,

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[1] The target area test has been followed by the Second Circuit in *Calderone Enterprise Corp.* v. *United Artists Theatre Circuit*, 454 F.2d 1292 (1971), cert. den., 406 U.S. 930 (1972), and many other cases. It has as well been followed by the cases mentioned in this opinion and still other other cases which I do not attempt to list.

The Second Circuit describes the target area rule as follows in *Calderone*, at p. 1295, and, while remembering that it should be applied on a case by case basis, I think the rule as applied in the Second Circuit should be followed:

> "In a series of decisions over the last 15 years, in all of which certiorari was denied by the Supreme Court, this court has committed itself to the principle that in order to have 'standing' to sue for treble damages under § 4 of the Clayton Act, a person must be within the 'target area' of the alleged antitrust conspiracy, i.e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued. Accordingly we have drawn a line excluding those who have suffered economic damage by virtue of their relationships with 'targets' or with participants in an alleged antitrust conspiracy, rather than by being 'targets' themselves. . . ."

sponsored by, but not made by, Richfield. Those sponsored accessories did not include Karseal's products. The court held that the right to sue was not limited to those independent distributors of Karseal's wax. In determining who has standing to sue, the courts must look at who the illegal act was aimed to injure. A bystander, who is not the intended victim of the antitrust violation but who is injured nonetheless, cannot sue under the antitrust laws. His injury is too remote.

In other words, it is not enough that a plaintiff show that one purpose of the defendant's act was a restraint of trade and that the act committed caused injury to the plaintiff. He must go further and show that he was within the sector of the economy endangered by the breakdown in competition in order to satisfy the "by reason of" requirement. *Karseal* at 363.

Miss McCready alleges that the district court erred by incorrectly applying the target area standard of *Newton*, as reflected in its conclusion that "the sector of the economy *competitively* endangered by a violation of the defendants goes no further than that area occupied by the psychologists." She quarrels with the district court's use of the word "competitively" as being contrary to the holding of *Newton*, where we noted that direct competition is not a prerequisite for standing. Although it may not be completely clear, I do not read the language of the district court to require direct competition between the parties. All the district court said was that the target of the Blue Shield defendants' actions was the psychologists and not the subscribers of Blue Shield plans. The district court did not use the word as a *sine qua non* of its decision but merely as descriptive of the way one sector of the economy was endangered by the defendants. The fact that Miss McCready was not in the threatened sector, the district court properly considered as supporting its conclusion to dismiss the complaint.

I would hold that plaintiff does not satisfy the requirement of § 4 that she be injured "by reason of" a violation of the antitrust laws. She does not claim that the actions of the Blue Shield defendants were aimed at injuring any group beyond the psychologists. The psychologists make up the group within the sector of the economy in which the illegal conduct of the Blue Shield defendants threatens to break down competitive conditions. Any injury to Miss McCready is too indirect and consequential to be actionable under § 4 of the Clayton Act. As the district court said, she operated in a market which was unrestrained so far as she was concerned.

My conclusion that the district court was correct in denying recovery is fortified, I think, by the reasoning of the Court in *Sonotone*, as well as by its acknowledgment in *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 262, n. 14 (1972), that "[t]he lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy for damages for all injuries that might be conceivably traced to an antitrust violation." In *Sonotone*, while holding that a consumer who purchased goods at an artificially high price caused by antitrust violations was injured in his property, the Court recognized that "[t]he phrase 'business or property' also retains restrictive significance," giving as an example personal injuries. It continued that "Congress must have intended to exclude some class of injuries by the phrase 'business or property' ". I thus think it is beyond argument that injury to business or property under § 4 has a restrictive meaning. The question before us is whether the plaintiff brings herself within the terms of the statute as construed by the applicable cases.

While no case is found subsequent to the decision in *Sonotone* on the same facts as those presented here, all three Circuits which have considered the matter since

that time have adhered to their earlier rulings giving restrictive significance to the requirement of § 4 of the Clayton Act, that, in order to recover, an antitrust plaintiff must have been injured in his business or property by something forbidden in the antitrust laws.

The first of those cases was *In re: Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979) (a multidistrict case). There, the plaintiffs were producers of fat cattle. They alleged that 25 retail food chains and others, by agreeing to purchase only at artificially low prices from slaughterhouses and packers, caused these low prices to be passed up the chain of distribution which reduced the prices the plaintiffs received in selling their cattle to the packers and slaughterhouses. Some of the plaintiffs alleged that they had purchased beef at retail as consumers at prices artificially high because of a retail price fixing conspiracy by the same defendants. The other plaintiffs did not so allege, however. Those who did not allege that they had purchased beef from the defendants maintained that the retail price fixing conspiracy reduced consumer demand for beef, thus derivatively reducing the retailers' and the packers' demand for their fat cattle. Their claim, then, was that they were injured by the retail price fixing conspiracy just as much as if they had bought beef. Relying on *Sonotone*, the court reversed the district court's striking the allegations of retail price fixing from the complaints of those plaintiffs who had purchased beef at retail. It sustained, however, the striking of the retail price fixing allegations from the complaints of the plaintiffs who had not purchased beef at retail. The court held squarely that those plaintiffs who had not purchased at retail did not have standing to sue for such remote injury, and that they were not within the target area of the retail antitrust conspiracy. The court held that the target of a retail price fixing conspiracy was the retail purchaser, and reasoned that recognizing the non-

purchasing plaintiffs as targets of the retail price fixing conspiracy would be to grant antitrust standing to firms and persons at every level of beef production and distribution, quoting note 14 in *Hawaii* v. *Standard Oil* as I have above.

The next case following *Sonotone* was *Sherman* v. *British Leyland Motors Ltd.*, 601 F2d 429 (9th Cir. 1979). Sherman was the owner of a corporation which had alleged a valid claim against British Leyland and others under the antitrust laws. His corporation had been forced to go out of business because its Triumph distributorship franchise had been canceled as a result of antitrust violations by the defendants. Although Sherman was injured in fact, and that was accepted, the court held that Sherman had no standing to sue in his individual capacity as a shareholder or as a creditor of his corporation because the loss was indirect. Id. at p. 439, 440.

The last decision of a court of appeals since *Sonotone* is *Engine Specialties, Inc.* v. *Bombardier Ltd.*, 605 F2d 1 (1st Cir. 1979). ESI had a contract with Agrati, an Italian firm, as Agrati's sole distributor in North America for Agrati minicycles. Bombardier wanted that distributorship, interfered with ESI's contractual relationship with Agrati, and agreed with Agrati to divide the market. The claim against Bombardier for interference with contractual relations aside, the court held that ESI had a valid claim under the Sherman Act against Bombardier for agreeing with Agrati to divide the market because the agreement necessarily required the extinction of ESI as North American distributor. Two of ESI's subdistributors were Durham and Watercraft. ESI's demise as the Agrati distributor necessarily resulted in their inability to obtain the Agrati product and in financial loss to them in having to compete with the product and in a consequential loss of sales. Actual injury to them

was acknowledged by the court. The court held, however, that neither Durham nor Watercraft had standing to sue under § 4 of the Clayton Act because they lay outside the target area of the conspiracy. The court found that the conspiracy between Bombardier and Agrati to divide markets was not aimed at the market level to which Durham and Watercraft were operating, that the anti-competitive acts taken against ESI were directed solely at ESI as a part of the scheme to divide territories, and that Durham and Watercraft were not the principal victims of the conspiracy but were innocent bystanders who were hit but not aimed at. The court said that "[a]lthough the natural result of depriving ESI of the Agrati product was to likewise deprive ESI's distributors of it, we think the distributors lie outside the target area section 4 encompasses." 605 F2d at 18. As did *Sherman* and *Beef Industries*, the court here considered the effect of *Sonotone* and nevertheless found that the plaintiffs did not have standing.

While two of the three cases[2] just discussed have no retail consumer as a plaintiff, each of the three stand for the proposition that the antitrust plaintiff must have been in the target area encompassed by the anticompetitive actions of the defendant or else recovery is not permitted.

I am of opinion the injury to McCready, that she is not eligible for reimbursement under her contract with Blue Shield, is too indirect and consequential for her to prosecute that claim under § 4 of the Clayton Act. She is not in the target area, that being in this case the

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[2] A fourth case, *Lucas* v. *Bechtel Corp.*, 633 F.2d 757 (9th Cir. 1980), intimates a compliance both with *Sonotone* and the Ninth Circuit's target area rule as expressed *In re Multidistrict Air Pollution*, 481 F.2d 122 (9th Cir. 1973), but the facts upon which that court relied for "inferences of standing" are not sufficiently stated in the opinion for me to rely on that case here.

psychologists. The price of psychologists' services to her was not increased by any act of the defendants. The fact that her Blue Shield contract, which was in the nature of insurance, would not reimburse her for those services had nothing to do with the price she paid for the services, which indeed were not artificially inflated by an antitrust violation. The area in which she operated was entirely unrestrained. I think McCready's claim falls squarely within the reasoning of *Sherman*, *ESI*, and *Beef Industries*.

The fact that Miss McCready's status as a consumer does not, under *Sonotone*, necessarily preclude her suit for lack of standing, does not mean that she necessarily has standing to sue as an antitrust plaintiff in this case, for, as the cases demonstrate, an antitrust plaintiff may have suffered actual injury but not be within the target area of the antitrust violation. If whether or not she was in the target area were questionable and subject to proof, then I would be inclined to hold that she had standing, and, if her claim should be dismissed, to require the dismissal of the claim for failure to state a claim upon which relief may be granted. *Bell* v. *Hood*, 327 U.S. 678 (1946); *Osborn* v. *Bank of United States*, 22 U.S. 738 (1824). For, as *Bell* and *Osborn* hold, when the jurisdiction of the court and the cause of action depend on the same fact, the court should assert its jurisdiction, and, if the case should be dismissed, dismiss it for failure to state a cause of action. She, however, has left no room for proof. Her only injury is that she has been unable to receive reimbursement for her psychologists' bills. There is not even a claim that her psychologists' bills are higher than they would have been had the conspiracy not existed. It is true that standing is a jurisdictional question. *Arlington Heights* v *Metropolitan Housing Corp.*, 429 U.S. 252, 260 (1977), but the facts as stated by the plaintiff show that she has no standing because they show that she is not within the

target area of the antitrust violation. Thus, dismissal of her case for that reason was proper. It is not necessary to remand for dismissal for failure to state a claim under *Bell* and *Osborn*.

While the standing issue in antitrust actions is a complex one and while I am warned that dismissal of antitrust claims on motions should be used "sparingly," *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464 (1962), I do not believe the district court erred in dismissing the complaint on motion. The plaintiff simply has not stated a claim to standing under § 4 of the Clayton Act. The plaintiff in *Sonotone* was a retail purchaser, and the violations charged included "vertical and horizontal price fixing." *Sonotone*, p. 335. While the plaintiff here might be considered a retail purchaser of services, there not only is no allegation of price fixing, there is no claim or allusion to it. The plaintiff has not placed herself within the protection of *Sonotone*.

II

A separate and more general ground for my disagreement with the result obtained by the majority is a proposition which has not been discussed in the allied case of *Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia, et al*, 624 F2d 476 (1980), in the opinion of the district court, or in the opinion of the majority, although it looms so large in the background it should not be ignored. It is essentially that a group of subscribers has a perfect right to contract with some providers of medical services, as used in the broad sense, without contracting with all of them, under pain of conviction under the antitrust laws.

In general terms, physicians are a dedicated lot. By education, training, and inclination, they devote their adult lives to the physical care of others. While the same measure of devotion may be claimed, or even obtained, by

other providers, the same level of skill is not. Physicians are recognized, certainly by the Commonwealth of Virginia, and I suppose by every State, by the issuance of licenses to practice medicine, a recognition not accorded to any other provider of medical services. To say that the subscribers to Blue-Cross-Blue Shield may not contract with psychiatrists, who are physicians, for their services, without having a court compel a contract with psychologists, who are not physicians, to me is straining the antitrust laws beyond any imagined coverage that they might have.

Without necessarily equating the services of psychologists with those of psychiatrists, the result obtained by the majority is without support. I submit nothing in the record supports such an equation.

If a group of people (the subscribers) wish to contract at lower premiums for one medical service (physicians) without contracting with another (psychologists), I think they have a perfect right so to do, and if they wish to place special trust in the physicians to approve any other allied medical service, I think they have a perfect right to do that also. The antitrust laws simply are not intended to cover the fact situation at hand.

I would affirm.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1883

CAROL MCCREADY, Individually and on behalf of all others similarly situated,
Appellant,

versus

BLUE SHIELD OF VIRGINIA, *et al,*
Appellees.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria
Albert V. Bryan, Jr., District Judge

Filed Jul. 2, 1981

The appellees' petition for rehearing and suggestion for rehearing en banc has been submitted to the Court. A poll of the Court was requested, and in the poll, a majority of the judges eligible to vote, voted to deny rehearing en banc.

The panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing en banc are DENIED.

Entered at the direction of Judge Butzner with the concurrence of Judge Thomsen (U.S.D.J.); Judge Widener dissents from the denial of rehearing by the panel and en banc for the reasons he set forth in his dissent to the panel opinion.

For the Court

/s/ William K. Slate, II
WILLIAM K. SLATE, II
Clerk

APPENDIX

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
(ALEXANDRIA DIVISION)

Civil Action No. 78-447A
Jury Trial Demanded

JANE DOE, individually and on behalf of all others similarly situated, Plaintiff,

v.

BLUE SHIELD OF VIRGINIA
2015 Staples Mill Road
Post Office Box 2741
Richmond, Virginia

BLUE SHIELD OF SOUTHWESTERN VIRGINIA,
1212 Third Street, S.W.
Box 2770
Roanoke, Virginia 24001; and

MEDICAL SERVICE OF THE DISTRICT OF COLUMBIA, INC.
550 12th Street, S.W.
Washington, D.C. 20024; and

NEUROPSYCHIATRIC SOCIETY OF VIRGINIA, INC.
Box 907
MCV Station
Richmond, Virginia 23298

Defendants.

COMPLAINT FOR ANTITRUST TREBLE DAMAGES AND OTHER RELIEF

Plaintiff Jane Doe brings this civil action for treble damages under the antitrust laws and for other relief and alleges as follows:

I. Jurisdiction and Venue

1. This claim arises under the antitrust laws of the United States, more particularly Section 1 of the Sherman Act, 15 U.S.C. § 1, and § 4 of the Clayton Act, 15 U.S.C. § 15, and this Court's pendant jurisdiction as hereinafter more fully appears. Jurisdiction of this Court is based upon 28 U.S.C. § 1337. Venue is proper under 15 U.S.C. § 22 and 28 U.S.C. § 1391.

II. Definitions

2. For purposes of this Complaint,

(a) *"Clinical psychologist"* shall mean a psychologist who is competent to apply the principles and techniques of psychological evaluation and psychotherapy to individual clients for the purpose of ameliorating or attenuating problems of behavioral and/or emotional maladjustment.

(b) The *"practice of clinical psychology"* shall mean the offering by an individual of his service to the public as a clinical psychologist.

(c) The phrase *"Blue Shield defendants"* refers to defendant Blue Shield of Virginia, defendant Blue Shield of Southwestern Virginia and defendant Medical Service of the District of Columbia, Inc.

(d) The term *"subscriber"* means any person who is entitled to participate in any of the benefits provided by any of the prepaid health care plans operated by the Blue Shield defendants.

III. Parties

3. Plaintiff is a natural person, a resident of Virginia, and a subscriber to one of the prepaid health care plans administered by the Blue Shield defendants. She has re-

ceived psychological services from a clinical psychologist duly licensed to practice in Virginia. Payment for the costs of such services is required under her prepaid health care plan, but except for one instance, defendant Blue Shield of Virginia has refused to reimburse her for the cost of her treatment. The refusal has been in furtherance of the unlawful conspiracy hereinafter alleged. Plaintiff will disclose her identity and such other facts as may be essential to the prosecution of this claim, but she is bringing this action under a fictitious name due to the sensitive and highly personal nature of the subject matter of this action.

4. The Blue Shield defendants are nonstock corporations which are engaged in the business of operating various plans for furnishing pre-paid health care benefits to consumers in Virginia. The Blue Shield defendants are substantial providers of pre-paid health care plans to consumers in Virginia. Such plans are contracted-for by individuals, governmental entities (including the Commonwealth of Virginia) and business concerns. Such contractholders make payments to the Blue Shield defendants who in turn undertake to provide benefits for health care services, rendered by participating and non-participating practitioners to subscribers. The majority of such plans cover or include the kind of services performed by clinical psychologists when those services are rendered and billed by a physician.

5. Defendant Blue Shield of Virginia serves part of western Virginia and all of eastern and central Virginia, except for those portions of northern Virginia which are served by defendant Medical Services of the District of Columbia.

6. Defendant Blue Shield of Southwestern Virginia serves all of the southern and part of the western portions of Virginia.

7. Defendant Medical Services of the District of Columbia, Inc., in addition to serving the District of Columbia, serves portions of northern Virginia.

8. Defendant Neuropsychiatric Society of Virginia, Inc. (NSV) is a not-for-profit nonstock corporation whose members are psychiatrists who practice in Virginia. One objective of NSV is to serve and promote the interests of psychiatrists in Virginia and NSV seeks to fulfill this purpose in a number of ways, including communications with the Blue Shield defendants, their agents and representatives concerning payment by the Blue Shield defendants for services rendered to subscribers by clinical psychologists.

9. All defendants either maintain offices, transact business, or are found themselves or through their agents in the Eastern District of Virginia, and the claims arose in the Eastern District of Virginia.

IV. Class Action Allegations

10. Plaintiff Jane Doe brings this action under Rule 23 of the Federal Rules of Civil Procedure on her own behalf and on behalf of all other subscribers who have incurred costs for psychological services rendered by clinical psychologists during the period 1973 to the date of class certification herein but who have not been reimbursed for such costs under applicable prepaid health care plans administered by defendants. For purposes of this Complaint an "applicable" plan is a plan under which payments for psychological services are made when those services are rendered by a physician.

11. This is brought as a class action because the members of the class, the exact size of which is presently unknown to plaintiff, are so numerous that joinder of all members is impractical, because there are questions of law or fact common to the class, because the claim of the representative party is typical of the claims of the class,

and because the representative party will fairly and adequately protect the interests of the class.

12. This action is maintainable by plaintiff Jane Doe under Rule 23(b)(3) as a class action because the questions of law and fact common to the members of the class predominate over any questions affecting only individual members.

13. Plaintiff is an adequate representative of the class in that her claims are typical of the claims of all class members and she has no interest antagonistic to or in conflict with the interests of other class members. Plaintiff will adequately represent the interests of the class.

14. Class action adjudication is superior to other available methods for the fair and efficient adjudication of the controversy in that neither plaintiff nor other members of the class have enough at stake personally to warrant individual prosecution of their claims against these corporate defendants, and therefore a class action will be the only means of protecting the rights of members of the class. Further, it is desirable to concentrate the litigation of such claims in this forum, and there are no difficulties likely to be encountered in the management of the class action.

IV. Co-Conspirators

15. On information and belief, various persons, corporations, professional associations and other entities not made defendants herein, participated as co-conspirators in the violations hereinafter alleged and performed acts and made statements in furtherance thereof.

V. General Allegations

16. Clinical psychologists compete with psychiatrists in the rendering to patients of psychological services including psychotherapy.

17. A psychiatrist needs no special license to practice psychiatry, but rather is a physician licensed to practice medicine in Virginia. All physicians who apply for certificates to practice medicine take the same examination, regardless of the specialty in which they desire to practice.

18. The Blue Shield defendants are the dominant providers of pre-paid health care plans covering consumers in Virginia. The Blue Shield defendants compete with various health insurance companies and other business concerns many of which are located outside of Virginia and which also provide prepaid health care and health insurance plans to consumers of medical services, including the services of clinical psychologists.

19. The Blue Shield defendants are members of and licensed by the National Association of Blue Shield Plans ("National Association"). Under such licenses, the Blue Shield defendants obtain the right to use the "Blue Shield" trademark and name. The National Association serves as a coordinating agency for the Blue Shield plans throughout the United States and provides other services to the Blue Shield plans.

20. The Blue Shield plans throughout the United States, including the Blue Shield defendants, have arrangements with one another regarding transfers of subscribers, underwriting of risks and other aspects of their business. The National Association has contracts for the administration of various federal prepaid medical services programs, but the administration of such programs is delegated to the local Blue Shield plans, including the Blue Shield defendants herein. Such programs administered by the Blue Shield defendants include the Federal Employment Health Benefit Program, (5 U.S.C. § 8901 *et seq.*), Part A of the Medical Program (42 U.S.C. §§ 1395c *et seq.*) and the Civilian Health and Medical Program of the Uniformed Services ("CHAMPUS"). The National Association has similar arrangements for the management and administration of

various nation-wide plans subscribed to by major corporations for the benefit of their employees located throughout the United States.

21. The Blue Shield defendants are governed by Boards of Directors. The Boards of Directors of the Blue Shield defendants traditionally have been dominated by physicians, who substantially influence and control the policies and practices adopted by the Blue Shield defendants.

VI. Trade and Commerce

22. The activities of the defendants, as set forth herein, are within the flow of interstate commerce or have an effect upon interstate commerce in at least the following respects:

(a) Clinical psychologists in Virginia treat substantial numbers of patients who travel into Virginia from out of state for treatment. They receive regular and substantial payment for services from out-of-state insurance companies. They receive regular and substantial payments, which originate out-of-state, from the federal government acting through the Blue Shield defendants for treatment of CHAMPUS and Medicare patients and for treatment of patients under other programs underwritten or paid for by the federal government. They also purchase substantial quantities of supplies and equipment from out-of-state sellers.

(b) Clinical psychologists in Virginia are hampered by the acts of defendants as alleged hereinafter in their ability to compete in the provision of psychological services to substantial numbers of Virginia and out-of-state patients, and their revenues from such patients are reduced, as is their ability to purchase out-of-state supplies and equipment.

(c) The acts and practices of defendants adversely affect the volume of psychological services provided throughout the Commonwealth of Virginia, and such acts

and practices reduce payments for services rendered by clinical psychologists to consumers whose prepaid health benefits are contracted-for by out-of-state entities.

(d) The acts and practices of defendants increase the cost of psychological services to substantial numbers of persons who travel in interstate commerce for such treatment, and the acts and practices of defendants tend to increase the cost of psychological services rendered to subscribers under both Virginia and out-of-state contractholders' prepaid health care service plans.

(e) Subscription fees and premiums are paid to Blue Shield defendants and other Virginia providers of pre-paid health care benefits by and on behalf of persons located out-of-state, and the acts and practices of defendants affect the amount and the distribution of the moneys represented by such fees and premiums.

(f) Fees for psychological services provided by clinical psychologists and by psychiatrists are paid into Virginia by out-of-state patients and health insurance companies.

(g) The Blue Shield defendants make substantial payments for covered health care services rendered to subscribers by practitioners located outside of the Commonwealth of Virginia; and they deny payments for psychological services rendered to subscribers by clinical psychologists located outside of the Commonwealth of Virginia.

(h) The Blue Shield defendants purchase substantial goods and services in interstate commerce, and the Blue Shield defendants engage in susbtantial interstate activities in cooperation and coordination of underwriting and other functions, including administration of nation-wide pre-paid health care plans with various out-of-state entities, including other Blue Shields and the National Association.

(i) The unlawful acts and practices of defendants as alleged herein affect not only the Blue Shield defendants

but also the interstate health insurance companies and business concerns compete with the Blue Shield defendants.

VIII. Violations Alleged

Count I (Federal Antitrust Law)

23. Plaintiffs repeat the allegations of paragraphs 1 through 22 as if fully set forth herein.

24. When psychological services including psychotherapy are rendered by a psychiatrist those services are covered by most of the plans operated by the Blue Shield defendants. When the same services are rendered by a clinical psychologist to persons under the same plans, those services are not paid by the Blue Shield defendants unless such services are billed to Blue Shield through a physician.

25. Beginning at least as early as 1971 and continuing to date, the defendants and co-conspirators have continuously engaged in an unlawful combination and conspiracy and unreasonable restraint of the aforesaid trade and commerce in violation of Section 1 of the Sherman Act as amended, 15 U.S.C. Section 1. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants and conspirators, the substantial terms of which have been to exclude and boycott clinical psychologists from receiving compensation under pre-paid health care plans in connection with the furnishing of psychological services including psychotherapy to subscribers to such plans.

26. The aforesaid concerted refusal by the Blue Shield defendants to pay for the services rendered by clinical psychologists to the holders of the Blue Shield pre-paid medical services plan contracts is a violation of the requirement under Virginia law that "[n]o plan for furnishing prepaid medical and surgical, and similar or re-

lated services, or any of such services, shall fail or refuse, either directly or indirectly, to allow or to pay for such services, or any part thereof, rendered by any . . . psychologist duly licensed to practice in Virginia," where the services rendered "are services provided for by such contract," and "are services which the . . . psychologist is licensed to render in Virginia." Code of Virginia § 32-195.10-1 (Cum. Supp. 1977).

27. As a further consequence of the acts and practices described hereinabove:

(a) clinical psychologists have been hindered in the providing of psychological services, including psychotherapy, to patients; and

(b) psychiatrists have gained an unlawful competitive advantage over clinical psychologists in the provision of psychological services to patients;

(c) patients have been economically coerced to receive psychological services from psychiatrists rather than clinical psychologists; and

(d) the public has been denied the benefit of free and open competition between clinical psychologists and psychiatrists in the provision of psychological services to patients.

28. Plaintiff and the members of plaintiff's class have incurred various costs for psychological services rendered to them by clinical psychologists during the period commencing in 1973 and continuing. Plaintiff Jane Doe and other members of the class are subscribers to applicable prepaid health care plans adopted and administered by the Blue Shield defendants. Under those plans, the Blue Shield defendants are obligated to reimburse plaintiff and other members of the class for the costs they have incurred in obtaining psychological services. In furtherance of and as a direct result of the unlawful combination

and conspiracy to boycott as hereinabove alleged, the Blue Shield defendants have unlawfully refused, and continue to refuse, to reimburse plaintiffs for such costs, because psychological services were rendered to them by clinical psychologists rather than physicians. The foregoing violations by the defendants have injured plaintiff Jane Doe and the members of the class in their business and property and have caused them substantial damages, the full extent of which are not yet known.

Count II (Breach of Contract)

29. Plaintiff repeats and realleges each and every allegation set forth in Paragraphs 2 through 28 above with the same effect as though fully set forth herein.

30. The claims set forth herein derive from a common nucleus of operative fact and arise under this Court's pendant jurisdiction.

31. Plaintiff and the members of plaintiff's class are subscribers to prepaid health care plans adopted and administered by the Blue Shield defendants and thus stand in a contractual relationship with those defendants. Under such plans, the Blue Shield defendants are obligated by law to provide for payment on behalf of, or reimbursement to, subscribers for psychological services received from clinical psychologists wherever those services would be covered when rendered and billed by a physician. Notwithstanding this requirement, the Blue Shield defendants have consistently refused to make such payments or reimbursements for psychological services rendered by clinical psychologists, and such refusal has been and is in breach of their contracts with subscribers, which incorporate the applicable statutory provisions by operation of law.

32. As a direct and proximate result of the breach of contract hereinabove alleged, plaintiff has suffered damages the full extent of which cannot be presently calculated.

33. The plaintiff and all other class members are similarly situated, in that all class members have similar plans in the pertinent respects and the acts of defendants have applied to and injured all class members equally.

IX. Prayer for Relief

WHEREFORE, plaintiffs demand

(1) As to Count I:

(a) That the Court adjust and decree that the defendants and co-conspirators have engaged in unlawful combination and conspiracy in restraint of the aforesaid trade and commerce in violation of Section 1 of the Sherman Act, as amended (15 U.S.C. § 1);

(b) That the Court award judgement against defendants jointly and severally for threefold the damages sustained by plaintiffs and all other members of the class;

(c) That plaintiffs be awarded the costs and expenses of the litigation, including attorneys' fees;

(d) That the Court order such other and further relief as may be deemed just and proper.

(2) As to Count II:

(a) That the Court award judgement declaring the acts of the Blue Shield defendants to be in breach of contract;

(b) That the Court award plaintiff and members of the class their damages plus costs and attorneys' fees; and

(c) That the Court order such other and further relief as may be deemed just and proper.

Respectfully submitted,

Of Counsel:

/s/ Warwick R. Furr, II
Warwick R. Furr, II
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/s/ Timothy J. Bloomfield
Timothy J. Bloomfield
Dunnels, Duvall & Porter
1220 19th Street, N.W.
Washington, D.C. 20036

Attorneys for Plaintiffs

Jury Demand

Plaintiffs hereby demand a trial by jury on all issues of law herein.

/s/ Warwick R. Furr, II
Warwick R. Furr, II

Tuesday, October 3, 1978
Fairfax, Virginia

Deposition of LILLIAN CAROL MCCREADY, taken pursuant to notice as amended by agreement of counsel and under protective order before Anne G. Walker, a notary public in and for the State of Virginia, At-Large, at the offices of Boothe, Prichard and Dudley, 4085 University Drive, commencing at 2:10 o'clock p.m.

APPEARANCES:

LEWIS, MITCHELL & MOORE
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WHITEFORE, HART, CARMODY & WILSON
By CHARLES J. STEELE, Esq.
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District of Columbia, Inc.

ROGOVIN, STERN & HUGE
By JOEL I. KLEIN, Esq.
For Defendant Neuropsychiatric Society
of Virginia, Inc.

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[14] By Mrs. Swartzchild:

Q. Are you a subscriber to Blue Shield? Are you currently?

A. Not currently.

Q. Have you ever been?

A. Yes.

Q. When was this?

A. From September 1975 until the end of January, 1978.

Q. What type of policy did you have?

A. It was a group policy with the county, with Prince William county.

Q. And this was while you were employed with Prince William—during the period of '75 to '78, you were not employed with Prince William, were you, the entire time?

A. Yes.

Q. I thought you said September '75 to January of 1978 you were a subscriber to Blue Shield.

[15] A. Right. I quit in '77, but my policy continued for one month after that.

Q. So you were employed by Prince William county from September 1975 until 1977. Is that right?

A. Right. Well, I started my employment the end of August, but the policy didn't start until September.

• • • • • • • • • • •

[25] By Mrs. Swartzchild:

Q. Ms. McCready, with regard to exhibit number 9, which is a memorandum dated March 17, 1976 to all employees, would you look at this and tell us what it is, and what it purports to be, how you received it?

Mr. Furr: I would like to object to a three-part question. Again, just in the interests of clarity, I ask that there be one question at a time.

By Mrs. Swartzchild:

Q. Ms. McCready, did you receive this document on March 17, or shortly thereafter?

A. Yes.

Q. From whom?

A. It was sent from the personnel department of Prince William county.

[26] Q. And you were employed by Prince William county at the time.

A. Right.

Q. Did you read that document?

A. I don't remember whether I did at the time, or not.

Q. Have you read it since?

A. I am sure I have looked over it.

Q. Do you recall when you might have read that?

A. No.

Q. Specifically, will you read for me the last paragraph, beginning with the sentence, Covered services, through the section—well, up to the section entitled, Exclusions?

Mr. Bloomfield: I suggest that that speaks for itself. You have made it an exhibit for identification for the record.

By Mrs. Swartzchild:

Q. Have you read that section, Ms. McCready?

A. Yes, I have.

Q. Okay. So specifically, you have read at some time the statement that says that covered services include psychotherapy services rendered by a psychiatrist [27] only.

Mr. Furr: Excuse me. I am going to object to making a statement, then just asking the witness to agree to it. I object to the form of the question.

MRS. SWARTZCHILD: I simply asked the——

MR. FURR: You may answer.

THE WITNESS: I have read that.

• • • • • • • • • • •

[66] BY MRS. SWARTZCHILD:

Q. What does the $510 represent?

A. That represents the amount of money that I did submit claims to Blue Cross Blue Shield for claims, and then stopped submitting claims because it didn't make any difference whether I submitted them or not.

• • • • • • • • • • •

[67] BY MRS. SWARTZCHILD:

Q. How much does Blue Shield owe you, in your opinion?

A. I have paid somewhere approximately around $3,000 for group therapy, so they owe me reimbursement for a percentage of that which my understanding was 80 percent.

Q. What was the basis of your understanding?

A. From the contract that I had with the county.

Q. Have you submitted a copy of that contract to us?

A. As I stated before, I don't have a copy of the contract. The county has kept the contract that I signed.

• • • • • • • • • • •

[78] BY MRS. SWARTZCHILD:

Q. For any treatment that you have received for your mental disorder, have you received bills for every treatment, every session?

A. Yes.

Q. Have you paid all of these bills?

A. Yes.

Q. In the full amount of the bill?

A. Yes.

• • • • • • • • • • •

[BLUE CROSS-BLUE SHIELD LOGO]

GROUP MAJOR MEDICAL CERTIFICATE—A

This Certificate, issued to the eligible enrolled Employee by the Participating Hospitals, in respect of provisions for hospital and similar or related services, and the Participating Physicians, in respect of physician and similar or related services, sets forth the benefits which will be provided to such Employee and to each of his eligible enrolled Dependents, if any, the extent of each benefit, the circumstances under which the benefits will be provided, the limitations and exclusions, and the termination provisions. Like terms and provisions are contained in the Group Contract issued to the Applicant.

Article I. Definitions

1. *Associations* means the Participating Hospitals for whom Blue Cross of Virginia acts in respect of hospital and similar or related services, and means the Participating Physicians for whom Blue Shield of Virginia acts in respect of physician and similar or related services.

2. *Applicant* means the employer or other person who applied for the Group Contract under which this Certificate is issued.

3. *Employee* means an employee of, or one represented by, the Applicant and who is eligible for coverage as provided by the terms of this Certificate and of the Group Contract, and who shall have been so designated to the Associations by the Applicant.

4. *Dependent* means (a) an Employee's spouse and (b) an Employee's dependent unmarried child under 19 years of age, the word "child" to include such step-children, foster children, and other children who depend upon the Employee for support and live with the Employee in a regular parent-child relationship.

5. *Subscriber* means the Employee, his or her spouse, and each other Dependent, only if and while such person is covered by the Group Contract. A spouse shall cease to be a Subscriber upon termination of marriage to the Employee. A child shall cease to be a Subscriber upon the attainment of 19 years of age, or on his or her marriage, whichever first occurs, except that any dependent unmarried child (as defined) whose age exceeds the Contract age limit, and who is incapable of self-support because of mental retardation or physical incapacity that commenced prior to attaining the age limit, is eligible to continue as a Subscriber under this Contract.

6. *Group Contract* and *Entire Contract* means the agreement between the Associations and the Applicant by virtue of which the Employees and their Dependents, if any, become Subscribers. The Group Contract, the New Group Enrollment Summary Form (hereinafter "Summary") therefor, any effective endorsements or riders, the Employee's individual application, and this Certificate, constitute the Entire Contract.

7. *Contract Year* means the twelve (12) months commencing on the Effective Date of the Group Contract and each yearly period thereafter.

8. *Hospital* means an institution which, for compensation from its patients and on an inpatient basis, is primarily engaged in providing diagnostic and therapeutic facilities for the surgical and medical diagnosis, treatment, and care of injured and sick persons by or under the supervision of a staff of physicians who are duly licensed to practice medicine, and which continuously provides twenty-four (24) hour a day nursing service by registered graduate nurses, and which is not, other than incidentally, a nursing home, or a place for rest, the aged, drug addicts, or alcoholics, or a place for the treatment of pulmonary tuberculosis or nervous or mental disorders.

9. *Physician* means a duly licensed physician legally entitled to practice medicine and surgery.

10. *Covered Medical Expenses* means usual, customary, and reasonable charges incurred by a Subscriber for the following medically necessary services performed or prescribed (after the Effective Date of the Subscriber's coverage) by a Physician in the treatment of an illness or accidental injury, all subject, however, to the exclusions and limitations set forth in Article IV:

(a) Services of Physicians;

(b) Bed, board, including special diets, and general nursing service in a Hospital except for the daily charges for private room occupancy in excess of Semi-private + $5;

(c) Use of operating or treatment room;

(d) Anesthetics and administration thereof;

(e) X-ray and diagnostic laboratory procedures;

(f) Radiation therapy;

(g) Oxygen and its administration;

(h) Blood transfusions, including cost of blood, blood plasma and blood plasma expanders;

(i) Drugs, medicines and dressings used in a Hospital; drugs purchased for use outside a Hospital which by Federal or State law may not be dispensed without a Prescription Order; and insulin;

(j) Services of a qualified professional physiotherapist;

(k) Services of actively practicing nurses, other than relatives or members of the family of the Subscriber, as follows:

(i) In a Hospital, services of a registered professional nurse (R.N.) or services of a licensed practical nurse (L.P.N.);

(ii) Other than in a Hospital, services of a registered professional nurse (R.N.);

(l) Rental of iron lung or other durable equipment required for temporary therapeutic use;

(m) Professional ambulance service used locally to or from the Hospital for inhospital services and for outpatient care of accidental injury;

(n) Prosthetic appliances necessary for the alleviation or correction of conditions arising out of accidental injury or illness.

In the determination of usual, customary, and reasonable charges, the Associations shall take into consideration, among other things, the charges made for the same or similar services by physicians in the same geographical area with similar training and experience or hospitals and other organizations or individuals providing similar services in the same geographical area where such services are performed.

11. *Benefit Period*

(a) Benefit Period means a period of one (1) calendar year commencing on each January 1.

(b) The first Benefit Period for Subscriber may commence on the Effective Date of coverage for a Subscriber, provided, however, that for any condition existing prior to the Effective Date of coverage for a Subscriber, the first Benefit Period for such condition or conditions related thereto may commence only following the expiration of at least ninety (90) consecutive days ending on or after the Effective Date of Subscriber's coverage under this Contract and during which time no expenses for services included under Covered Medical Expenses were incurred on account of said Subscriber.

(c) A Benefit Period may not commence prior to the Subscriber's Effective Date.

(d) A new Benefit Period commences for a Subscriber while covered under the Contract each January 1, except as limited in Article III.

(e) An expense shall be deemed to have been incurred on the date the service for which the charge is made shall have been received or rendered.

(f) In the event Subscriber's Effective Date is on other than January 1, the Benefit Period will be the remaining months of such year, provided, also, that if all or any part of the Deductible Amount is incurred during the last calendar quarter of any Benefit Period, the amount so incurred will be credited against the amount required by Article I, Paragraph 12, for the succeeding Benefit Period.

12. *Deductible Amount*

(a) Deductible Amount means the first 100 of Covered Medical Expenses. Covered Medical Expenses excluded from the Subscriber's basic coverage(s) because of a deductible endorsement or provision, if any, may NOT be included in determining the Deductible Amount as defined in this subparagraph (a).

(b) Except as provided in subparagraphs (c) and (d) of this Paragraph 12, the Deductible Amount shall be applied to the Covered Medical Expenses incurred by each Subscriber in each Benefit Period.

(c) In the event that one or more of the Subscribers covered under this Certificate incur charges for Covered Medical Expenses as a result of injuries received in the same accident, then only one Deductible Amount shall be applied to the aggregate of all charges for Covered Medical Expenses which are incurred by all such Subscribers as a result of such injuries.

(d) In no event will a maximum aggregate family deductible be more than three times a Subscriber's deductible amount as shown in subparagraph (a).

Article II. Eligibility for Coverage

Subject to the provisions of the Group Contract, coverage shall be available to employees of the eligible classification(s) designated by the Applicant in the Application for the Group Contract.

Article III. Payments Provided by Associations for Services

If a Subscriber shall incur Covered Medical Expenses for services in excess of the Deductible Amount determined pursuant to Article I, Paragraph 12, then, subject to the exclusions and limitations of Article IV, the Associations agree to pay to the Hospital, Physician, or Subscriber, as the case may be, 80% of the amount of such excess expenses, provided, however, that in no event shall the Associations be obligated to more than $250,000 in one (1) or more Benefit Periods to, or on behalf of, a Subscriber under this or any other Major Medical Contract now or hereafter issued by the Associations.

Article IV. Exclusions and Limitations

No payments shall be provided hereunder on account of:

(a) Services or supplies for any condition, ailment or injury arising out of and in the course of employment, or for services or supplies which are available to a Subscriber under any law, ruling, or regulation of the United States or any of its branches or of any State or political subdivision thereof;

(b) Disease contracted or injuries sustained as a result of war, declared or undeclared, or any act of war;

(c) Dental care and treatments, dental surgery or dental appliances unless such charges are made necessary by accidental bodily injury occurring while the Subscriber is covered under the Group Contract;

(d) Eyeglasses or hearing aids or examinations for the prescription or fitting thereof;

(e) Services or supplies for cosmetic purposes, except for the correction of defects incurred through traumatic injuries sustained by the Subscriber while covered under the Group Contract;

(f) Services or supplies not incidental or necessary to treatment of injury or sickness;

(g) Services or supplies for nervous or mental disorders outside of a hospital or in the outpatient department of a hospital;

(h) Services or supplies rendered for childbirth, abortion, miscarriage, caesarean section, prenatal or postnatal care, or for routine care of a newborn infant;

(i) Travel, whether or not recommended by a physician;

(j) Convalescent, custodial or sanitaria care or rest cures;

(k) Services or supplies not specifically listed as Covered Medical Expenses in Article I, Paragraph 10;

(l) Services and supplies enumerated as Covered Medical Expenses in Article I, Paragraph 10 which are incurred during each Benefit Period in connection with the illness or injury of a Subscriber while such Subscriber is covered under the Group Contract to the extent that such services and supplies are provided for the Subscriber under or by any one or more of the following plans for which any employer shall directly or indirectly have paid all or a portion of the cost or made payroll deductions:

(i) any group coverage other than provided for by this Contract;

(ii) basic coverage(s) provided by these or any other Blue Cross or Blue Shield Plan(s) or by any other hospital, surgical or medical service plan; or

(iii) any State or governmental plan or law;

(m) Services or supplies received by a Subscriber during other than a Benefit Period.

Article V. Termination of Coverage

1. If there is a failure to pay proper charges to the Associations within thirty (30) days after they become due and payable, the Contract is automatically terminated, and no Subscriber shall be entitled to any benefits hereunder except as hereinafter provided.

2. In the event an Employee ceases, with or without cause, to be eligible under the Group Contract, or in the event the Applicant notifies the Associations that coverage of an Employee is to be terminated, or in the event the Group Contract is cancelled by the Applicant or the Associations, then, subject to the provisions of Paragraph 6 of this Article V, the coverage respecting such Employee and all of his or her Dependents, if any, shall terminate automatically, without notice to the Employee, at the end of the then current period for which payment of the charges shall have been made for such Employee.

3. If an Employee is required to pay the whole, or any part, of the charges herefor to the Applicant and if such Employee fails to pay or make suitable provision for payment of such charges within thirty (30) days after they become due and payable, then the coverage respecting such Employee and all of his or her Dependents, if any, shall terminate automatically at the end of said thirty (30) day

period, notwithstanding the provisions of Paragraph 6 of this Article V.

4. The coverage of the spouse or of a Dependent of an Employee shall automatically cease on failure to meet the qualifications recited in Paragraphs 4 and 5 of Article I.

5. Subject to Paragraphs 3 and 6 of this Article V, no termination of a Subscriber's coverage under the provisions of this Article V shall invalidate or reduce any claim hereunder for injury sustained or sickness commencing prior to the effective date of such termination.

6. In the event of termination of a Subscriber's coverage under the provisions of Paragraphs 1, 2, 4 or 7 of this Article V, such Subscriber shall be entitled to benefits only for Covered Medical Expenses incurred as a result of an illness commencing or injury occurring prior to such termination, but only for a period which shall be the lesser of either: (a) a period equal to the length of time such Subscriber was covered under the Group Contract, or (b) one Benefit Period.

7. In the event a Subscriber ceases to be covered under the basic coverage(s) described in the Application for this Certificate, then this coverage shall be automatically terminated on the date such basic coverage(s) are terminated and no benefits will be provided hereunder for any illness commencing or injury sustained after such termination.

8. *Effect of Termination of Contract*—All coverage under this Contract shall terminate at the time this Contract is cancelled or terminated and replaced by other group coverage, and no services provided or expenses incurred after such time shall be covered under any Article of this Contract.

Article VI. General Provisions

1. *This Certificate*

(a) This Certificate is non-assignable.

(b) All statements made by the Applicant or by the Employee shall be deemed representations and not warranties and no such statement shall be used in defense of a claim hereunder unless it is contained in a writing.

2. *Notice and Proof of Claim*

(a) Written notice of injury or sickness upon which claim is based must be given to the Associations within twenty (20) days after the end of the Benefit Period for which the claim is made.

(b) Such notice given by or in behalf of a Subscriber to the Associations at their office address as stated in Article VII hereof, with particulars sufficient to identify the Subscriber, shall be deemed notice to the Associations. Failure to give notice within the time provided shall not invalidate or reduce any claim, if it shall be shown not to have been reasonably possible to give such notice and that such notice was furnished as soon as was reasonably possible.

(c) The Associations, upon receipt of such notice, will furnish to the Subscriber forms for filing proof of loss. If such forms are not so furnished within fifteen (15) days after the Associations receive such notice, the Subscriber shall be deemed to have complied with the requirements as to proof of loss upon submitting, within the time fixed for filing proof of loss, written proof covering the occurrence, character and extent of the loss for which claim is made.

(d) Affirmative written proof of loss for which claim is made must be furnished the Associations within ninety (90) days after the termination of the period for which

claim is made. Failure to furnish proof of loss within the time provided shall not invalidate or reduce any claim if it shall be shown not to have been reasonably possible to furnish such proof and that such proof was furnished as soon as was reasonably possible.

(e) The Associations will pay, or provide for payment of, all proper and covered claims as soon as is reasonably possible after receiving adequate written proof of loss.

3. *Limitations of Action*

No action at law or suit in equity shall be brought to recover under this Certificate or the Group Contract prior to the expiration of sixty (60) days after written proof of loss has been filed in accordance with the foregoing requirements, nor shall such action or suit be brought at all unless brought within three (3) years from the expiration of the time within which proof of loss is required.

4. *Continuing Liability of Participating Hospitals and Physicians*

A Participating Hospital or Physician, on withdrawing from membership in its or his Association, nevertheless will continue obligated to render services under the Contract until the end of the then current Contract Year; and any Hospital or Physician becoming a member of its or his Association will thereupon become obligated to render services under the Contract.

5. *Amendments*

Except where otherwise limited, the Entire Contract may be amended from time to time by agreement between the Associations and the Applicant.

Article VII. Notice

Written notice given the Applicant shall be mailed or delivered to the office stated in the Summary; written notice given the Associations shall be mailed or delivered to the Associations at their offices at 2015 Staples Mill Road, Box 27401, Richmond, Virginia 23279; and written notice given a Subscriber shall be mailed or delivered to the Subscriber at his address as it appears on the records of the Associations or addressed to him in care of the Applicant.

BLUE CROSS OF VIRGINIA AND
BLUE SHIELD OF VIRGINIA

/s/ ALDEN E. FLORY
President

Endorsement No. E-3

MAJOR MEDICAL SERVICE CERTIFICATE

NERVOUS OR MENTAL DISORDERS
OUT-OF-HOSPITAL

ARTICLE IV, Section (g), is deleted in its entirety.

The Participating Hospitals
by BLUE CROSS OF VIRGINIA
and

The Participating Physicians
by BLUE SHIELD OF VIRGINIA

/s/ ALDEN E. FLORY
President and Chief Executive Officer

MM-68 E-3

March 17, 1976

To: ALL EMPLOYEES

From: OFFICE OF PERSONNEL

Subj: BLUE CROSS AND BLUE SHIELD

The following is a brief summary of your Blue Cross Blue Shield and Major Medical benefits, exclusions, waiting periods, claims procedures, etc:

BENEFITS

Blue Cross *(Hospital)*

Inpatient—Semi-private room paid-in-full
—365 days care per confinement
—Ancillary services paid-in-full
—7 days care for maternity

Outpatient—Accidental injury (initial care must be within 72 hours of accident)
—Minor surgery
—Radiological therapy

Blue Shield *(Physicians)*

Usual, customary and reasonable fees paid for the following:

Inpatient—Surgery
—Medical visits—70 per confinement
—Delivery
—Care of newborn
—Anesthesia
—Consultations

Outpatient—Accidental injury
—Minor surgery
—Diagnostic x-rays—$150 per person each 12 months

—Diagnostic laboratory tests—$150 per person each 12 months
—Radiological therapy
—Pathology

Participating Physicians, as a special service, agree to accept Blue Shield allowances as payment-in-full for *covered* services.

MAJOR MEDICAL

$100 deductible per person per calendar year (limit of three deductibles per family)
80% reimbursement for covered services
$250,000 lifetime maximum (per person)
Covered services include

—medical care in the Outpatient Department of a hospital
—cost of blood
—private duty nursing services
—prescription drugs
—office visits for the treatment of an illness
—up to $5 of private room charges
—ambulance service used locally
—rental of durable equipment
—psychotherapy (services rendered by a psychiatrist only)

EXCLUSIONS (under all contracts)

Routine physical examinations (including x-rays and lab tests)
Pre-natal laboratory tests
Pre-natal office care

CLAIMS PROCEDURES

BLUE CROSS *(Hospital)*

Inpatient—Present your identification card to the admissions office and the hospital will file the claim for you.

Outpatient—Hospitals within the Virginia Plan Area will file claims for covered services for you.

—Hospitals within the Washington, D.C. and Maryland Plans Areas will file claims for accidental injury or minor surgery for you.

—Hospitals in other areas, and claims for other covered services except accidental injury and minor surgery received in the Washington, D.C. or Maryland Plan Areas may require you to file the claim. To do so, just send a copy of the itemized statement including the diagnosis, your contract number and indicate whether or not you have paid the bill, to the local Blue Cross and Blue Shield Office. If you have paid the bill, the Blue Cross office will reimburse you; otherwise, payment will go to the hospital.

BLUE SHIELD *(Physicians)*

Physicians in our Plan area have been provided with pre-printed claim forms and must file the calim on this form.

Physicians outside our Plan Area would use their local Blue Shield claim form but caution them to mail the completed form to the Blue Cross Claims Department

in Richmond. In the event a doctor does not have any claim forms available, have him send Blue Cross an itemized statement including the diagnosis, a complete breakdown of the charges if more than one service is rendered, your contract number and the patient's birthdate.

MAJOR MEDICAL

You must keep your own records and file your own claim. Itemized statements attached to a completed Major Medical Claim Report are required. Cancelled checks are not acceptable. Major Medical Claim Reports can be secured by calling the Manassas Office—361-6636.

WAITING PERIODS

Maternity care is available only to the subscriber or to the subscriber's spouse under Subscriber and Family coverage which has been in continuous effect for a period of nine months.

Major Medical benefits for any condition existing prior to the effective date of your Major Medical Contract may commence only following the expiration of at least 90 consecutive days ending on or after the effective date of coverage and during which time no covered medical expenses were incurred for such or related conditions.

USUAL, CUSTOMARY AND REASONABLE ALLOWANCES

The *usual* charge is the most frequent charge by an individual physician to his patients for a given service.

A fee is *customary* when it is within the range of *usual* charges for a given service billed by at least 90% of the physicians within a given area.

A charge is reasonable when it meets the usual and customary criteria, or it may be reasonable if in the opinion of an appropriate medical review committee it merits special consideration based on complexity of treatment of the particular case.

COORDINATION OF BENEFITS (COB)

COB is a method of "coordinating benefits" when a subscriber and his family are covered by more than one group health care program, so that duplicate payments aren't made for the same claims. This is a simple and efficient way to help keep costs down.

If one of the carriers does not have a Coordination of Benefits provision (yours does), it will always be primary.

If both carriers have Coordination of Benefits Provisions:

—The husband's program will become the primary carrier when he requires health care services, with the wife's program designated the secondary carrier.

—If the wife is a patient, her program will be the primary carrier.

—If a dependent child in the family is a patient, the father's program will be the primary carrier.

—If the subscriber is the same person under both group health care programs, the primary carrier will be the program under which the individual has been enrolled for the longest period of time.

The Manassas Office of Blue Cross and Blue Shield is available to assist you with any questions or problems that might arise pertaining to your coverage. The office is open from 8:30 to 4:30 Monday through Friday. It is located at 9598 Surveyor Court (near Prince William Hospital). You can reach the office by telephone on either 368-6663 or 361-6636.

P W C

PRINCE WILLIAM COUNTY, VA. PERSONNEL

9300 Peabody Street Manassas, Va. 22110 (703) 368-9171

October 13, 1976

Mr. Charles R. Shrader, Manager
Blue Cross-Blue Shield
9598 Surveyor Court
Manassas, Virginia 22110

Re: Contract # 259-82-8407

Dear Mr. Shrader:

After our telephone conversation of last week I understand the $128.00 payment to Lillian Carol McCready was processed in error by Blue Cross-Blue Shield.

We request that Blue Cross-Blue Shield absorb the $128.00 and not deduct this amount from any future claims of this employee.

I also understand from our conversation that Prince William County will not be responsible in any way for this payment error.

Thank you for consideration and I trust your Company will honor my request.

Sincerely,

/s/ CLEIL W. FITZWATER
Cleil W. Fitzwater
Personnel Director

CWF/jah

cc: L. Carol McCready
Alvin J. Schilling

BLUE CROSS - BLUE SHIELD OF VIRGINIA

2015 Staples Mill Road
Richmond, Virginia 23279

Post Office Box 27401
804/359-7000

10-28-76

RE: McCREADY, Lillian
Contract No.: 259828407

Dear Mrs. McCready:

We have received a Major Medical claim for services rendered the patient whose name appears above.

After reviewing this claim, we find the charges enclosed are not covered under your Major Medical Contract.

We are sorry that we could not be of service to you at this time; however, if we can provide you with any further information, please let us know.

Sincerely,

Subscriber Service Section

Enc(s)

P.S. Direct billing from a psychologist (Ph.D.) is not covered under your Major Medical Contract. These services must be supervised and billed for by a physician. (M.D.).

[BLUE SHIELD-BLUE CROSS logo and address illegible]

November 29, 1976

Patient: McCready, Lillian
Contract No.: 259 828 407
Date of Service: 5-5-76 thru 7-21-76

Mrs. Lillian C. McCready
207 North Fairfax Street, #6
Alexandria, Virginia 22314

Dear Mrs. McCready:

The following payments were made for services rendered on the above referenced date.

PAID TO	AMOUNT
Lillian McCready	$125.00

This payment was made in error; the appropriate explanation is outlined below:

On the Major Medical claim processed on September 13, 1976, we covered charges for services rendered you by the Northern Virginia Psychological Center. Since this was a direct billing from a PHD. we should have denied this claim) as services rendered by a PHD. will have to be under the supervision of a M.D. and billed through him.

We would, therefore, appreciate your refunding the amount of $128.00 to us. To insure proper credit, please return this letter with your refund.

Thank you for your cooperation.

Sincerely,

S. J. Caldwell
Subscriber Services

SJC/daa

cc: Subscriber Services

BLUE CROSS - BLUE SHIELD OF VIRGINIA

2015 Staples Mill Road
Richmond, Virginia 23279

Post Office Box 27401
804/359-7000

March 15, 1977

Patient: McCready, Lillian
Contract No.: 259 828 407
Date Incurred: 5-5-76 thru 7-21-76

Mrs. Lillian C. McCready
207 North Fairfax Street, #6
Alexandria, Virginia 22314

Dear Mrs. McCready:

As of this date we have not received the refund of $128.00 which we requested from you November 29, 1976.

Please remit the full amount by return mail in order to avoid further collection efforts.

If there are any questions, please do not hesitate to call. If payment has been mailed, please disregard this notice. To insure proper credit please return this letter with your check.

Sincerely,

/s/ S. J. CALDWELL
S. J. Caldwell
Subscriber Services

SJC/daa

P.S. As a reminder, enclosed is a copy of our original refund request of November 29, 1976.

BLUE CROSS - BLUE SHIELD OF VIRGINIA

2015 Staples Mill Road
Richmond, Virginia 23279

Post Office Box 27401
804/359-7000

May 10, 1977

Patient: McCready, Lillian
Contract No.: 259 828 407
Date Incurred: 5-5-76 thru 7-21-76

Mrs. Lillian C. McCready
207 North Fairfax Street
Apartment 6
Alexandria, Virginia 22314

Dear Mrs. McCready:

Your claim file has been forwarded to me to pursue a refund owed to us by you in the amount of $128.00.

Due to a mistake of fact, the amount shown above was paid in your behalf although your Contract did not allow for this payment. We regret that the error ocurred; however, if the claim had been processed correctly, it would have been your responsibility to make payment in that same amount to the provider of services. Since we paid benefits in error, it is now your responsibility to reimburse us for this payment.

This is the second and final notice concernin this obligation. If we do not hear from you within fifteen (15) days of the date of this letter, appropriate legal steps will be taken to recover the due amount.

Sincerely.

/s/ BERT WILSON
Bert Wilson
Benefit Control Department

BW/daa

August 1, 1977

Mr. Richard L. Burroughs
Insurance Claims Investigator
Bureau of Insurance
P.O. Box 1157
Richmond, Virginia 23209

Dear Mr. Burroughs:

I regret that I have been delayed in sending my complaint with Blue Cross and Blue Shield in writing: however, my concern, anger and frustation with their tactics in delaying my claim and their "reasoning" for refusal prompt me to write to you now.

I entered a therapy group lead by Dr. Theodore Grant in May of 1976 on a once-a-week basis at the rate of $30.00 per session. Dr. Grant is a licensed Ph.D. Psychologist and does meet all requirements for third party payment. However, Blue Cross and Blue Shield has continually refused to honor my claim. In June of 1976 I submitted my first claim and had already satisfied the $100.00 deductible. Blue Cross proceeded to send to me a series of inane letters stating that I had not met the deductible requirement, which I obviously had satisfied. After three letters concerning this issue, they agreed. Blue Cross then stalled by sending a letter wanting to know how many members were in the therapy group. I responded to them in writing; eight members. Next they sent a letter asking if I had any other insurance coverage. No I do not. During this time I frequently made phone calls to Mr. Caldwell at the B.C. & B.S. office in Richmond. He merely added to the confusion and demended a letter of referral from an M.D. My doctor sent them a letter stating that he had referred me to Dr. Grant. Blue Cross then refused to accept my claim unless my doctor used his billing system to bill me for therapy. My doctor could not do this. I felt this request to be obsurd from the begining, but avidly attempted to meet all of their requests.

During all of this back-and-forth correspondence, Blue Cross sent to me a reinbursement check for $128.00, which I immediately used to pay my rapidly growing therapy bill. I soon received a letter from Blue Cross stating that the reinbursement was a mistake; and they wanted it back immediately. They also stated that if I did not send the money back; they would not reimburse any medical claims until the $128.00 was satisfied. I have refused to return the money; and Blue Cross has not payed subsequent medical claims which have been submitted. I continued to receive threatening letters from them.

Within the past year I have sought out various means of getting assistance with this problem. I have requested clarification for their refusal of my claim. Clearly, the law states that I am entitled to receive reinbursement. I do not understand their right to refuse a legitiment claim.

I would greatly appreciate any further assistance you can provide.

Thank You.

Sincerely,

/s/ Carol McCready
Carol McCready

COMMONWEALTH OF VIRGINIA
Box 1157
Richmond, Va. 23209
Telephone (804) 786-3741

John G. Day
Commissioner of Insurance

James W. Newman
Deputy Commissioner of Insurance

STATE CORPORATION COMMISSION
BUREAU OF INSURANCE

August 26, 1977

Blue Cross Blue Shield of Virginia
P. O. Box 27401
Richmond, Virginia 23279

Attention: Mrs. Pauline L. Smith
Subscriber Service Specialist

Re: Lillian Carol McCready
Contract Number—259-82-8407

Dear Mrs. Smith:

Enclosed is a photostatic copy of a letter from the above referenced subscriber, which you should find self-explanatory.

Due to the statement made in the second paragraph of the above mentioned letter that Ms. McCready was referred to Dr. Grant a psychologist for treatment, which in the opinion of this Bureau would constitute medical necessity, we request that you have this matter reviewed and furnish us with the benefit of your comments at an early date.

Your usual cooperation in this matter will be deeply appreciated.

Yours truly,

/s/ R. L. B.
R. L. Burroughs
Investigator

RLB/kac
Enclosure

cc: Ms. Carol McCready
3336 Gunston Road
Alexandria, Virginia 22302

COMMONWEALTH OF VIRGINIA
Box 1157
Richmond, Va. 23209
Telephone (804) 786-3741

John G. Day
Commissioner of Insurance

James W. Newman
Deputy Commissioner of Insurance

STATE CORPORATION COMMISSION
BUREAU OF INSURANCE

September 21, 1977

Ms. Carol McCready
3336 Gunston Road
Alexandria, Virginia 22302

Re: Blue Cross/Blue Shield of Virginia

Dear Ms. McCready:

We are enclosing a copy of a letter received by this Bureau from Blue Cross/Blue Shield of Virginia regarding your recent inquiry to this office, which we feel you will find self-explanatory.

Please be advised that the Insurance Code of Virginia prohibits this Bureau from becoming involved in controversies between Blue Cross/Blue Shield and the subscriber, and we can therefore, only suggest that you await the decision of the Supreme Court of Virginia regarding this matter.

We regret very much our inability to be of further assistance regarding the matter.

Yours truly,

/s/ R. L. BURROUGHS
R. L. Burroughs
Investigator

RLB/kac
Enclosure

BLUE CROSS - BLUE SHIELD OF VIRGINIA

2015 Staples Mill Road
Richmond, Virginia 23279

Post Office Box 27401
804/359-7000

Edwin P. Munson
Resident Counsel and Contract Officer

Langhorne H. Smith
Assistant Resident Counsel

September 16, 1977

Mr. R. L. Burroughs
Investigator
Bureau of Insurance
State Corporation Commission
Box 1157
Richmond, Virginia 23209

Re: Lillian Carol McCready
Contract Number—259-82-8407

Dear Mr. Burroughs:

Thank you for your letter of August 26, 1977, regarding the recovery sought by Blue Cross/Blue Shield in the amount of $128.00 for benefits paid to Ms. McCready for services rendered by Doctor Theodore Grant, a clinical psychologist.

Your letter states that since Mrs. McCready was referred to Doctor Grant for treatment, this would constitute medical necessity. This claim was not denied due to medical necessity. It was denied because our contracts provide only for the services of physicians. This is interpreted by our policies to include the services of allied health professionals, such as psychologists, only when supervised by and billed through a physician.

We are aware of the statutory provision contained in Section 32-195.10:1 of the Code of Virginia, but have taken the position that the 1973 amendment to this Statute is

unconstitutional. There is presently pending in the Supreme Court of Virginia, a case in which the State Corporation Commission has taken issue with our contention that the Statute is unconstitutional.

Ever since 1973, we have recognized the possibility that we might ultimately be unsuccessful in the litigation of this matter. In recognition of this possibility, we are reserving amounts for payment to our subscribers which would have been payable if the Statute is constitional.

Ms. McCready's case is a little different in that the payment was made by mistake by us, and we are now seeking a refund. We do not think that any of the letters written by us to Ms. McCready are threatening as described by Ms. McCready. However, we do feel that consistent application of our contracts would justify our seeking a recovery from Ms. McCready with the understanding that the amount might be payable at a later date in the event of an unsuccessful conclusion to the current litigation.

If other information is requested, we should be glad to forward it.

Sincerely yours,

/s/ Edwin P. Munson
Edwin P. Munson

EPM:meh

MANASSAS MEDICAL CENTER
9202 Centreville Road
Manassas, Virginia 22110
703-368-3161

General Medicine:
John G. Ringler, M.D.
Robert A. W. Latimer, M.D.
Claude K. Hylton, M.D.
W. James Werner, M.D.

Consultants in Radiology:
Harold M. Hagen, M.D.
George A. Solack, M.D.

9 November 1976

Blue Cross-Blue Shield of Virginia
P. O. Box 27401
Richmond, Virginia 23270

Re: Lillian Carol McCready
Contract No: 259 828 407

Gentlemen:

Lillian Carol McCready is a patient of mine and was recently referred for an evaluation and treatment of an emotional disorder to Dr. Theodore F. Grant.

Very truly yours,

/s/ W. JAMES WERNER, M.D.
W. James Werner, M.D.

WJW:jr

• • • • • • • • • • •

The following are examples of medically unnecessary services for which benefits would be denied:

A patient receives a series of diagnostic tests while he is a bed patient. The tests are the only reason he spends the night in the Hospital. The tests are routinely performed on an out-patient basis. There are no medical reasons for bed patient care. Benefits would be denied for medically unnecessary bed patient care. The tests may be covered, but only to the extent they would have been Included Services for an out-patient.

A patient retains a private duty nurse who either performs services that could have been performed by the nurses employed by the Hospital, or performs services which are unskilled, such as bathing, feeding, or sitting with the patient. These services would not be Medically Necessary services and benefits would be denied.

Whenever possible, find out about services before they are performed. Discuss them with Your Doctor. Ask if they can be performed on an out-patient basis. Your Doctor should welcome Your interest and concern. Never ask him to put You in the Hospital when he says You can receive out-patient care. If You have additional questions, contact the Plans.

N. Exclusions. This word means services which will not be covered under any circumstances. Exclusions are limitations on Included Services. You will find Exclusions listed in Article III.

O. Waiting Period. This phrase means a specified period of time ending on or after the Participant's Effective Date

which must pass before benefits for Included Services for certain conditions will be made available. See Article III.

P. Benefit Period. This phrase means a calendar year beginning on January 1 and ending December 31. It can also mean a part of a calendar year if Your Effective Date is other than January 1, or if You terminate Your coverage on other than December 31. During Your first Participant Year, the Benefit Period extends from Your Effective Date to the next December 31. If Your coverage is terminated—regardless of the reason—the Benefit Period will end on the same date Your coverage terminates. See Paragraph K. of Article VI for information about limited benefits that may be available to You after Your last Benefit Period ends.

Q. Included Service. This phrase means the Medically Necessary (see Paragraph M.) health care services or supplies for which the Plans will provide benefits through this Contract (see Paragraph R. of this Article). When it is necessary to discuss a particular Included Service, the type of service will be identified. Included Hospital Services, Included Doctors' Services, Included Services for Private Duty Nursing, and similar phrases will be used.

R. Allowable Charges. With the exception of Paragraphs R.2. and R.6. of this Article, this phrase means the usual, customary, and reasonable charges—as determined by the Plans—which are incurred by a Participant after his Effective Date for the Included Services listed below. Paragraphs R.2. and R.6. are exceptions because they contain additional specific dollar limits on benefits which are available. All Included Services listed in this Paragraph are controlled by the limitations on benefits explained in this Contract. Some of the most important limits on benefits are explained in Article III, Waiting Period and Exclusions.

R.1. Included Doctors' Services

Services of Your Doctor are covered, in or out of the Hospital. The following are examples of Included Doctors' Services:

- medical services,
- surgical services,
- surgical assistant services,
- consultation services,
- anesthesia services,
- pathological and laboratory services,
- diagnostic x-ray services, and
- radiological therapy services.

R.2. Included Hospital Services for Your Room and Meals
Your Hospital room and meals, including special diets and general nursing services, are Included Services. **The Allowable Charges for these services will be**

- $10 each day **plus**
- the Base Program amount payable for Your room and meals through Your Blue Cross and Blue Shield Contract.

R.3 Included Hospital Services for Other Bed Patient Care
In addition to benefits for Your room, meals, and general nursing care, the following are also Included Hospital Services for a bed patient:

a. Operating, recovery, or treatment room services;

b. Medications, drugs, solutions, and biological preparations used in the Hospital;

c. Oxygen, oxygen tent, and inhalation therapy;

d. Dressings and plaster casts;

e. Laboratory services;

f. Anesthesia services and supplies;

g. Diagnostic tests;

h. Physiotherapy (unless hospitalized primarily for physiotherapy, in which case Your room and meals will not be covered);

i. Pathological examinations;

j. Administration of infusions and transfusions;

k. Cost of blood, blood plasma, blood derivatives, blood volume expanders, and responsibility fees or professional donor fees;

l. Radiological services consisting of:

- diagnostic x-ray examinations,
- radium, radon, and cobalt therapy, and
- use of radioisotopes and the rental or cost of radioactive materials;

m. Services for speech and hearing therapy;

n. Chemotherapy;

o. Hemodialysis; and

p. Occupational therapy:

- for the physical rehabilitation of a Participant suffering from a disabling disease or injury or
- in connection with covered psychotherapy.

R.4. Included Hospital Services for an Emergency Room Patient

When a Participant requires care in a Hospital emergency room but is not admitted as a bed patient, Included Services listed in the preceding Paragraph (R.3.) will be available.

R.5. Included Dental Services for Accidental Injury

Dental Services and dental appliances required to diagnose or treat accidental injuries occurring on or after Your Effective Date are covered. Included Dental Services also cover the repair or replacement of dental appliances damaged as a result of an accident to the jaws, mouth, or face.

R.6. Included Services for Private Duty Nursing

Private Duty Nursing Services are covered up to a Benefit Period maximum of $500. Medically skilled services of an actively practicing Registered Professional Nurse or Licensed Practical Nurse may be approved as Included Services when:

the nurse is not a relative or member of the Participant's family,

the attending Doctor certifies to the Plans in writing that the Private Duty Nursing Services were Medically Necessary, and

the certification includes a detailed description of the nursing services needed and performed.

Examples of medically skilled nursing services are: administration of medication, checking vital signs, cardiopulmonary care, dressing of sores, and changing and irrigating Foley catheters.

R.7. Included Servces for Prescription Drugs and Insulin

Prescription Drugs and Insulin purchased for use outside a Hospital are covered. A Prescription Drug is any medication which—by Federal or State law—cannot be dispensed without a prescription order. A prescription order is a direction by a licensed Doctor for the preparation and administration of a Prescription Drug.

R.8. Included Services for Durable Medical Equipment

Durable Medical Equipment is covered, but only to the extent of Allowable Charges for monthly payments, up to the purchase price. Examples of Durable Medical Equipment are:

- iron lung,
- renal dialysis machines,
- resuscitators,
- hospital-type beds,
- traction equipment,
- wheel chairs, and
- walkers.

If, in the judgement of the Plans, the purchase of an item of Durable Medical Equipment will be less expensive than rental, or if the equipment is not available for rental, monthly payments toward the purchase of the item may be approved.

Benefits will not be provided for such items as air conditioners, dehumidifiers, whirlpool baths, and other equipment which has **non**-therapeutic as well as therapeutic uses.

R.9. Included Services for Appliances and Orthopedic Braces

The following Appliances and Orthopedic Braces are covered:

- artificial arms and legs, including accessories,
- leg braces, including attached shoes (built-up shoes for post-polio patients are included; however, corrective shoes are not covered),
- arm braces,

- back braces and neck braces,
- surgical supporters,
- head halters, and
- splints.

Included Services also cover the fitting, adjustments, and repair of an Appliance or Orthopedic Brace which must be adapted to the patient's physical characteristics.

R.10. Included Services for Medical Supplies

Medical Supplies consisting of the following only are covered:

- syringes, needles, and related supplies for conditions such as diabetes,
- dressings for conditions such as cancer or burns,
- catheters,
- colostomy bags and related supplies, and
- oxygen and the equipment for its administration.

R.11. Included Services for Contact Lenses and Eyeglasses

Eyeglasses or Contact Lenses are covered only under the following circumstances:

a. Eyeglasses or Contact Lenses prescribed to perform the function of human lenses lost as the result of intraocular surgery or injury to the eye;

b. "Pinhole" glasses prescribed for use after surgery for a detached retina; and

c. Lenses which are prescribed instead of surgery for the following conditions:

(1) Contact Lenses used for the treatment of infantile glaucoma,

(2) Corneal or scleral lenses prescribed in connection with keratoconus,

(3) Scleral lenses prescribed to retain moisture when normal tearing is not possible or is not adequate, and

(4) Corneal or scleral lenses needed to reduce a corneal irregularity (other than as astigmatism).

A maximum of one set of Eyeglasses or one set of Contact Lenses will be provided for the original prescription or for any change in the original prescription. Included Services will be offered for examinations and replacement of the Eyeglasses or Contact Lenses provided the prescription change is related to the condition which required the original prescription.

R.12. Included Professional Ambulance Services

Professional Ambulance Services are covered when used locally to or from a Hospital or other provider recognized by the Plans for bed patient care or for out-patient care. Transportation must be to the nearest Hospital (or other provider) with facilities which are adequate to treat the patient's condition.

NOTE: If the patient could have been transported in a private car, Ambulance Services will not be considered Medically Necessary.

R.13. Included Services of Allied Health Professionals

Services of Allied Health Professionals who perform other Included Services under the direct supervision of the attending Doctor are covered when:

the services are ordered in writing by the supervising Doctor,

the professional is licensed or otherwise qualified to perform the service,

the supervising Doctor retains or employs the professional and is responsible—both legally and ethically—for the Included Services performed, and

the services of the Allied Health Professional are billed for by the supervising Doctor.

The following are examples of Allied Health Professionals: psychiatric social workers, nurse practitioners, and nurse-anesthetists.

S. Deductible Amount. This phrase means the first $100 of Allowable Charges a Participant incurs during a Benefit Period. This amount is paid by the Participant, not the Plans. There are two exceptions:

If two or more Participants in the same family are injured in the same accident and need Included Services for injuries received in the accident, only one $100 Deductible Amount will be required.

Allowable Charges incurred during the last three months of a calendar year which are used to satisfy the Deductible Amount for the Benefit Period in which they were incurred, may also be used to satisfy the Deductible Amount for the following Benefit Period.

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Opposition

Office-Supreme Court, U.S.
FILED
SEP 2 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-225

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BLUE SHIELD OF VIRGINIA,
BLUE SHIELD OF SOUTHWESTERN VIRGINIA
and
NEUROPSYCHIATRIC SOCIETY OF VIRGINIA, INC.
Petitioners,

v.

CAROL MCCREADY, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION

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No. 81-225

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BLUE SHIELD OF VIRGINIA,
BLUE SHIELD OF SOUTHWESTERN VIRGINIA

and

NEUROPSYCHIATRIC SOCIETY OF VIRGINIA, INC.
Petitioners,

v.

CAROL MCCREADY, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION

PRELIMINARY STATEMENT

Under Rule 17 of this Court's Rules, "[a] review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." As the argument below shows, there are no "special and important reasons" for granting a Writ of Certiorari here. Respondent and her class members are Blue Shield subscribers to whom Petitioners denied reimbursement for psychological services, as a means of enforcing a physician conspiracy against clinical psychologists. The result of that conspiracy was that McCready and other subscribers were denied the benefits of health coverage mandated by State law[1] and, by an employer as part of its compensation package.

[1] Va. Code Ann. 38.1-348.7, 38.1-824.

On the basic issue of whether these consumers were within the "target area" of the antitrust violation, Petitioners have contrived a conflict in the circuits based on cases which hold that mere incidental or indirect victims of conspiracies are not entitled to standing under Section 4 of the Clayton Act. The Fourth Circuit's decision here,[2] far from representing a departure from these sound principles, is a rather routine application of "target area" analysis to these direct and intended victims of the breakdown in competitive conditions in the health care services sector of the economy.

Petitioners' other arguments are similarly unconvincing and demonstrate no grounds to justify the Court's further consideration. Simply because two plaintiffs may be entitled to recover for a single antitrust violation is no basis for contending that Respondents' injury is indirect, duplicative, or otherwise not a proper injury for compensation under Section 4. Moreover, the subscribers' injuries here in being denied reimbursement for fees paid to psychologists were separate and distinct from the injuries due to loss of patients suffered by the psychologists. The subscribers' injuries, no less than those of the psychologists, are entitled to compensation under the antitrust laws.

Because the standards of Rule 19 are not met here, the Petition for a Writ of Certiorari should be denied.

SUPPLEMENTAL STATEMENT OF THE CASE

This case does *not* involve competition between insurance companies in the health insurance market, as

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[2] McCready v. Blue Shield of Virginia, 649 F.2d 228 (4th Cir. 1981).

asserted in the Petition. It arises from a conspiracy among physicians—which has already been established in a related case which this Court has declined to review—acting through the Blue Shield Plans (the "Plans") as their agents, to keep non-physicians from "working their way into the therapy field." *Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia,* 624 F.2d 476, 481 n.6 (4th Cir. 1980), *cert. denied,* 101 S. Ct. 1360 (1981) (*"VACP"*).

In *VACP,* the Fourth Circuit found an antitrust violation based on allegations identical to those here at issue. The court there characterized the Plans as the "dominant source of health care coverage in Virginia," and held that the Plans had combined and conspired to restrict competition between physicians and non-physicians with regard to Blue Shield subscribers. *Id.* at 485. Noting the contrast between insurance companies and the Plans, the Court of Appeals concluded that the Plans are not insurers, but rather are providers of pre-paid health care services; and that as such, "in a real and legal sense, the Blue Shield Plans are agents of their member physicians." *Id.* at 480.

This conclusion was predicated not only upon the Virginia statutory framework for the Plans, but also on the Plans' own freely adopted organization and structure. The Court of Appeals noted that Blue Shield had been openly "sponsored" by the Medical Society of Virginia, and had widely held itself out as "the doctors' plan for the doctors," asserting that:

> When new programs are established, they are sustained by reimbursement principles representing the collective judgments of area physicians acting through societies and through Board representation. [*Id.* at 480 n.4]

More specifically, in settling upon "reimbursement principles" which excluded mental health care services when provided by psychologists but not when provided by physicians, the Plans were guided by the desires of their member physicians and not by considerations of insurance coverage or actuarial risk. In reaching this conclusion, the Fourth Circuit relied upon this statement by a Blue Shield official:

> It was brought out that a *number of groups*, which have a part in the overall mental health picture, *are little by little working their way into the therapy field*. It seemed to be the consensus that the Medical Society of Virginia should take a firm stand on this *encroachment and seek to stop it once and for all*. (emphasis added) [*Id.* at 481, n.6]

In *VACP*, the Court of Appeals specifically dismissed a contention which Petitioners insist on repeating here notwithstanding its proven invalidity. The Petition states several times that McCready's contract did not cover the services of a psychologist. (Petition 5, 17, 19, 20, 23) But the Fourth Circuit stated that:

> In the present case, however, both Plans have been covering these mental and nervous disorders in their contracts since at least 1962. Their decision regarding psychologists was not *whether* to underwrite the risk of those disorders or even the need for psychotherapy; rather it was a question of *who* they would pay for such services. (emphasis added) [Id. at 484][3]

---

[3] After remand in *VACP*, the District Court initially ordered restitution to ensure that subscribers could process claims that had been unlawfully denied. It is ironic that Petitioners persuaded the District Court to reconsider, and then deny, restitution, contending that such relief, if at all, must be awarded under Section 4. Yet now Petitioners insist that that relief would also be inappropriate here because McCready lacks "standing."

This case does not involve issues of insurance coverage decided by a health insurer in competition with other insurers, nor does it involve an employer's choice of a less expensive policy. What it does involve is a proven conspiracy among physicians, acting through the Plans as their agent, to keep non-physicians from "working their way into the therapy field." This conspiracy was effectuated by denying subscribers reimbursement for psychologists' services, thus resulting in the antitrust injury here at issue.

(a) The allegations in the Complaint.

The Petition omits important allegations in McCready's Complaint. McCready alleged, in pertinent part, as follows:

> 3. Plaintiff is a natural person, a resident of Virginia, and a subscriber to one of the prepaid health care plans administered by the Blue Shield defendants. She has received psychological services from a clinical psychologist duly licensed to practice in Virginia. Payment for the costs of such services is required under her prepaid health care plan, but except for one instance, *defendant Blue Shield of Virginia has refused to reimburse her for the cost of her treatment. This refusal has been in furtherance of the unlawful conspiracy hereinafter alleged.* (emphasis added) [App. Para. 3][4]

The Complaint also alleged that:

> In *furtherance of and as a direct result of the unlawful combination and conspiracy* to boycott

[4] With respect to the one claim for which McCready was reimbursed (in the amount of $128), Blue Shield informed her that the payment had been an error, and that if she did not return the amount received, "appropriate legal steps" would be taken.

> as herein above alleged, the Blue Shield defendants *have unlawfully refused, and continue to refuse, to reimburse plaintiffs for such costs, because psychological services were rendered to them by clinical psychologists rather than physicians.* The foregoing violations by the defendants have injured plaintiff Jane Doe [McCready] and the members of the class and their business and property and have caused them substantial damages, the full extent of which are not yet known. (emphasis added) [App. Para. 28]

Accordingly, the *McCready* Complaint asserts that the defendants utilized nonpayment to plaintiff as their means of unlawfully restricting competition between psychiatrists and psychologists. They did this by refusing to reimburse McCready for the services of her clinical psychologist. Thus an added cost, a surcharge, was placed on her decision to use the disfavored provider: The defendant Plans struck at psychologists only by inflicting injury in the first instance upon Respondent and other similarly situated subscribers.

Ruling in favor of McCready, the Fourth Circuit accurately characterized the allegations in her Complaint when it stated:

> Although the ultimate goal of the conspiracy alleged by plaintiff was the exclusion of clinical psychologists from a large segment of the market, *the direct victims of the conspirators include McCready and the class of similarly situated patients whom she seeks to represent, as well as the clinical psychologists; both were in the target area. The complaint alleges that the conspirators exclude psychologists by making it too expensive for Blue Shield subscribers to consult them.* This is accomplished by Blue Shield's refusal to reimburse a subscriber for the services of a psychologist unless the patient also consulted a physician. (emphasis added) [649 F.2d at 231]

(b) The decision below.

The Petitioners seriously misstate the decision below when they claim that the Fourth Circuit "disregarded" the target area rule (Petition 7) and suggest that the Fourth Circuit has devised a new rule allowing standing to all plaintiffs who can allege any injury which is causally related to a violation. The decision below correctly noted that Section 4 of the Clayton Act does not restrict antitrust standing solely to competitors of the conspirators. Otherwise, individual *consumers* could not have standing, and such a result would conflict with this Court's recent decision in *Reiter* v. *Sonotone Corp.*[5] Further, the decision below rests on the analysis of an earlier Fourth Circuit case, *South Carolina Council of Milk Producers, Inc.* v. *Newton*,[6] where the Fourth Circuit articulated the target area rule in a way even the Petitioners would have to accept:

> If a plaintiff can show himself within the sector of the economy in which the violation threatened a breakdown of competitive conditions and that he was proximately injured thereby, then he has standing to sue under Section 4. See *Conference of Studio Unions* v. *Loew's Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919, 72 S.Ct. 367, 96 L.Ed. 687 (1952); *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955). This sector is sometimes designated as the "target area" of the defendants' illegal practices. [360 F.2d at 418]

The Fourth Circuit below thoroughly reviewed the policy reasons for denial of standing in those situations where injury has been deemed "indirect" or "remote" under the target area test, and it found that none of these was present here. As the court stated:

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[5] 442 U.S. 330 (1979).

[6] 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966).

> First, it [the target area test] bars suits by persons whose damages are speculative and difficult to prove. See *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit*, 454 F.2d 1292, 1295 (2d Cir. 1971). This reason for denying standing does not apply to McCready. Her damages can be readily ascertained to the penny; they are her reimbursable costs of treatment. These are fixed by her Blue Shield contract as 80% of the amount she paid the psychologist.
>
> The second purpose of the target area is the prevention of multiple recoveries by different plaintiffs against the same defendants for a single injury. *Ames* v. *American Telephone & Telegraph Co.*, 166 F. 820, 823 (C.C.D. Mass. 1909). The second reason for denying standing also does not apply to McCready. There can be no double recovery. She has already paid her psychologist's bills; the psychologist suffered no damage in this respect. Although McCready is a consumer and not a competitor, her allegations of direct pecuniary loss by reason of antitrust violations are sufficient to confer standing. *Sonotone, supra; South Carolina Council of Milk Producers, supra.* [649 F.2d at 231-232]

The decision below did not, as Petitioners repeatedly assert, create a "simple causality rule". (Petition 11, 15, 20) Instead, the decision below represents a reasoned application of the target area test to a particular set of facts. In this regard, it should be noted that Petitioners sought rehearing and *en banc* consideration, arguing that the decision below conflicted with other Fourth Circuit decisions, with cases in other circuits and with cases in this Court. These arguments were rejected by the entire Fourth Circuit, which denied rehearing.

REASONS FOR DENYING THE WRIT

None of the reasons advanced by Petitioners for granting the Writ stands up under analysis. The Fourth Circuit decision is both clearly correct and legally unremarkable. There is no conflict or confusion between the circuits which could be clarified by using this case as a vehicle to refine the laws of antitrust standing, but rather the decision was compelled by the teaching of recent Supreme Court cases under Section 4 of the Clayton Act.

(a) The decision of the Fourth Circuit does not conflict with the decisions of the Second, Fifth or any other Circuit.

Petitioners have plainly contrived an alleged conflict when they assert that the decision below rejects the target area test and allows standing based merely on a causal connection between violation and injury. Their contention, for instance, that other circuits limit standing to those persons whom defendants intend to hurt finds no support in recent decisions in other circuits. Rather, the courts of appeal have produced a body of law which, although sometimes cast in different language, produces consistent and rational results in a great variety of factual situations. Under any formulation used in any circuit, McCready would have standing to sue.

The Petition first tries to manufacture a conflict between *McCready* and the Second Circuit decision in *Calderone Enterprises, Corp.* v. *United Artists Theatre Circuit, Inc.*[7] There, the court denied standing to a movie theatre landlord (Calderone) which complained

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[7] 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

of lost rental income due to antitrust injury inflicted on the theater operator. The Court there held that the landlord's injury was both indefinite and incidental, since it resulted only because of a general diminution of box office receipts to which the landlord's rents happened to be tied in part under the lease.

By contrast, the *McCready* Complaint alleges that defendants have attempted to exclude psychologists from the business of providing services to Blue Shield subscribers, and that they have done so by refusing to reimburse the *subscriber*, thereby making it too expensive for the *subscriber* to use a clinical psychologist. That fact, *i.e.*, refusal to reimburse McCready for services of a psychologist, was the very means by which the Plans chose to unlawfully restrict competition between psychiatrists and psychologists. Likewise, the subscriber was the very instrumentality or medium through which the unlawful scheme was intended to be implemented. Injury to McCready was therefore not incidental, but rather essential, to the Petitioners' unlawful design. The psychologists may have been the ultimate targets, but McCready and other subscribers were necessarily those who were most directly aimed at. Nonpayment to Respondent and those similarly situated was the bullet, and the psychologists were to be struck by a richochet.

Just as McCready would have standing under the Second Circuit decision in *Calderone*, the Fourth Circuit decision in *McCready* would deny standing to Calderone (the movie theatre landlord). Allowing recovery by the landlord, whose damages would be difficult to prove, would also permit multiple recoveries. If the landlord could sue, so too could the ticket manufacturer, and the popcorn vendor, *etc.*, and the total of

damages proven by persons derivatively injured could far exceed injury to the theatre operator, who might also sue.

If "target area" is to survive as a viable analytical tool, it cannot be restricted to mean that only the ultimate objects of defendants' conspiracies have standing. It must mean that all persons in the target area who suffer direct injury have standing, whether or not they were specific targets. In *Calderone* itself, the Second Circuit described persons in the target area as including "a person against whom the conspiracy was aimed, *such as* a competitor of the persons sued." (emphasis added) 454 F.2d at 1295. But standing is, of course, not limited to injured competitors, *Reiter* v. *Sonotone Corp., supra,* and under traditional target area analysis, a plaintiff has standing to sue if he can "show himself within the sector of the enocomy in which the violation threatened a breakdown of competitive conditions and that he was proximately injured thereby." *South Carolina Council of Milk Producers, Inc.* v. *Newton, supra,* 360 F.2d at 418; *Accord, Jeffrey* v. *Southwestern Bell,* 518 F.2d 1129, 1131 (5th Cir. 1975).

Certainly, McCready is within the "*sector of the economy*" threatened by the breakdown of competition conditions. A "sector of the economy" includes *all* of its integral parts, and it makes no sense, and conflicts with the law, to isolate—as Petitioners do—only one portion of the sector (*i.e.*, the suppliers of services) in order to deny standing to consumers in a three-party market. Surely the concept of an economic sector collapses if the consumers or purchasers of goods or services produced or sold in that sector are screened out of the sector. *See e.g., Conference of Studio Unions* v. *Loew, Inc.,* 193 F.2d 51, 54 (9th Cir.), *cert. denied,* 342

U.S. 919 (1952) (target area evaluated in terms of whether plaintiff produced or exhibited motion pictures or whether it competed with or bought from sellers in the markets); *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358, 364 (9th Cir. 1955) ("area of economy" evaluated in terms of who were sellers and who were buyers of competing products).

Interestingly, *Calderone*, which does contain statements that standing is limited to those "aimed" at, is not the Second Circuit's latest word on the subject. Thus, in *Schwimmer* v. *Sony Corp.*,[8] the Court specifically rejected any notion that there had to be specific intent in order to satisfy the target area test, and also stated:

> Thus an indirect purchaser is considered a "target" of a seller's price discrimination if there is evidence that the discrimination was "aimed at" the indirect purchaser by virtue of the *nature and foreseeable effect of the antitrust conspiracy.* (emphasis added) [637 F.2d at 49]

Similarly, in *Reading Industries, Inc.* v. *Kennecott Copper Corp.*,[9] the Second Circuit characterized the "target area" and "direct injury" tests in this way:

> Both are ultimately tests of whether there is a legally significant casual relationship between the alleged violation and the alleged injury. [631 F.2d at 12]

Thus, the Second Circuit has not taken the kind of ritualistic approach to standing suggested by Peti-

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[8] 637 F.2d 41 (2d Cir. 1980).

[9] 631 F.2d 10 (2d Cir. 1980), *cert. denied*, 69 L.Ed.2d 420 (No. 80-1717, 1981 Term).

tioners. Also, it is noteworthy that the Second Circuit in *Reading* acknowledged that there were two categories of persons who had standing to sue (631 F.2d at 14), an observation in direct conflict with Petitioners' apparent contention that McCready should not be allowed to sue simply because a psychologist was a plaintiff in *VACP*. (Petition 20)

The decision below is not inconsistent with the Fifth Circuit decision in *Pan-Islamic Trade Corp.* v. *Exxon Corp.*,[10] the other case used by Petitioners to suggest a conflict between the circuits. The alleged "conflict" here is based on an inaccurate portrayal of the Fifth Circuit's decision. Plaintiff in *Pan-Islamic* had *first* alleged a boycott, as stated in the Petition, but the defendants were granted summary judgment on that claim because plaintiff had no admissible evidence. Thereupon, plaintiff sought to amend the complaint to allege, in conclusory terms, that the defendant oil companies combined and conspired to violate Sections 1 and 2 of the Sherman Act with respect to the various operational areas of the petroleum industry.[11] Because plaintiff had no connection with those areas, *i.e.*, it did not operate in those sectors of the economy by either competing in or purchasing in those areas—the court held it had no standing.

By contrast, plaintiff McCready dealt directly in the affected area, in that she purchased from a psychologist, and she paid the penalty inflicted by the conspir-

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[10] 632 F.2d 639, 546-47 (5th Cir. 1980).

[11] These areas were (1) exploration and production of crude oil; (2) transportation of crude oil; (3) refining crude oil; (4) transportation of refined petroleum products; and (5) marketing of refined petroleum products.

acy. McCready would have standing in the Fifth Circuit, and Pan-Islamic would correspondingly have no standing in the Fourth Circuit. Again, no conflict among the circuits exists.

The Petition rests heavily on the assertion that the decision below confers standing on anyone who can establish a casual link between injury and violation. (*See, e.g.*, Petition 20) But that conclusion is at odds with a fair reading of the *McCready* decision. The Fourth Circuit requires more than a casual connection. It is grounded in the well-reasoned conclusion that McCready was in the target area. She was a "direct victim" because the conspiracy tried, by refusing reimbursement, to make it "too expensive" for her to use a psychologist. The Fourth Circuit explicitly bars suits by persons whose damages, despite a casual link to the violation, are "speculative and difficult to prove"; and, notwithstanding a casual link, it also prevents "multiple recoveries by different plaintiffs against the same defendants for a single injury."

The decision below certainly creates no conflict between the circuits. While not all circuits describe the standing requirements under Section 4 of the Clayton Act in the same terms, the *results* are consistent among the circuits, and are fully in keeping with principles contained in the Supreme Court's recent decisions under the Act.

(b) The Fourth Circuit decision is in full accord with the principles announced in this Court's recent decisions under Section 4 of the Clayton Act.

Petitioners contend that the Fourth Circuit decision conflicts with principles of this Court's recent decisions under Section 4 of the Clayton Act. The decisions cited

are *Hawaii* v. *Standard Oil Company*,[12] *Illinois Brick Co.* v. *Illinois*,[13] *Reiter* v. *Sonotone Corp., supra* and *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*[14] In fact, however, these cases support the decision below, and the result which Petitioners seek would conflict seriously with those decisions.

The Supreme Court decision most directly applicable is *Reiter* v. *Sonotone Corp., supra,* where this Court held that a consumer purchasing goods for personal needs had standing to sue under Section 4. At a minimum, *Reiter* means that standing cannot be limited to business competitors who are injured by antitrust violations. Standing cannot be denied because injury was neither commercial nor competitive in nature.

The Court's analysis in *Reiter* is directly applicable here. First, the Court observed that Section 4 contained no restrictive language, and recited the following statement from an earlier landmark decision:

> The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co., supra,* 334 U.S. at 236. [442 U.S. at 337]

In *Reiter,* the Court noted that the Sherman Act was designed as a remedy for *individuals,* especially consumers, and the Court rejected an argument, similar to one offered by Petitioners here (Petition 20-21) that its decision would produce more law suits. Squarely

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[12] 405 U.S. 251 (1972).

[13] 431 U.S. 720 (1977).

[14] 429 U.S. 744 (1977).

addressing this contention that consumer class actions would burden the courts, the Court stated:

> That may well be true but cannot be a controlling consideration here. We must take the statute as we find it. Congress created the treble damages remedy of Section 4 precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws in detering violations. * * * To be sure, these private suits impose a heavy litigation burden on the federal courts; it is the clear responsibility of Congress to provide the judicial resources necessary to execute its mandate. [442 U.S. at 344]

The Petition next asserts that *Hawaii* v. *Standard Oil Co., supra,* supports its position because in *Hawaii* the Court observed that lower courts had not allowed Section 4 to "provide a remedy in damages for *all* injuries that might *conceivably be traced* to an antitrust violation." [405 U.S. at 262 n.14] (Petition 16) However, the Petition conveniently ignores the critical parts of *Hawaii*. As the Court later noted in *Reiter* (442 U.S. at 342), the *Hawaii* decision—that States could not sue under Section 4 in a *parens patriae* capacity—was designed to avoid duplicative recoveries. This objective was taken into full account in the decision below:

> The second purpose of the target area is the prevention of multiple recoveries by different plaintiffs against the same defendants for a single injury * * * The second reason for denying standing also does not apply to McCready. There can be no double recovery. She has already paid her psychologists' bills; the psychologists suffered no dam-

> age in this respect. Although McCready is a consumer and not a competitor, her allegations of direct pecuniary loss by reason of antitrust violations are sufficient to confer standing. *Sonotone, supra; South Carolina Council of Milk Producers, supra.* [649 F.2d at 231-32]

While the Court acted in *Hawaii* to avoid duplicative recovery, the Court was also emphatic that there be a plaintiff for each injury:

> Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress * * * This system depends on strong competition for its health and vigor, and strong competition depends, in turn, on compliance with antitrust legislation. In enacting these laws, Congress had many means at its disposal to penalize violators. * * * Instead, Congress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation. By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as "private attorneys general". [405 U.S. at 262]

If standing is denied to McCready, there would be no remedy for the injury inflicted on her and members of her class. Accepting the allegations of the Complaint, as must be done, and accepting the *VACP* decision that defendants violated the antitrust laws, it is apparent that McCready was injured by an antitrust violation. She clearly did not receive the benefit under her Blue Shield contract that she would have received had there been no violation. Moreover, if *she* cannot sue to redress that injury, then *no one* can. As correctly acknowledged in the decision below, the psy-

chologist who treated McCready was not injured—as to her treatment—because he was paid by her for rendering it. While other psychologists may have been injured—*i.e.*, those who lost the business of patients who instead sought treatment from psychiatrists so that Blue Shield would pay their claims—they cannot claim any damages with respect to McCready as part of such losses. There is no duplication here. The Fourth Circuit decision is entirely consistent with *Hawaii*, for it allows all those who are injured to sue, yet prevents duplicative recoveries.

Contrary to Petitioners' arguments, this Court's decision in *Illinois Brick Co.* v. *Illinois, supra*, also supports McCready's claim. Petitioners contend that *Illinois Brick* limits recovery to direct purchasers because prices paid by "indirect" purchasers are the result of pricing decisions by intermediaries, and therefore cannot be attributed to antitrust violations. The Petition continues:

> Applied to McCready's claim, this rationale requires that she not be accorded standing, because her alleged "injury" results from an independent decision of her employer to purchase a group contract that did not cover psychologists' services. Her employer could have purchased a broader, but more expensive, policy. It did not. Like the indirect purchasers in *Illinois Brick Co.*, McCready lacked standing. (Petition 17)

This contention not only misconstrues *Illinois Brick*, as shown below, it also seriously distorts the *McCready* Complaint.

First, the Blue Shield contracts did *not* fail to cover psychologists' services. Those services were excluded as a result of an antitrust violation. In fact, Blue

Shield paid for identical services when performed by physicians. In terms of coverage, the Blue Shield contracts were therefore the same as the others available in the marketplace, as was explicitly held by the Fourth Circuit in *VACP, supra.*

Further, however, *Illinois Brick* reflects this Court's conviction that Section 4 should be construed to allow complete, but not duplicative recovery. Referring back to its ruling in *Hanover Shoe* v. *United Shoe Machinery Corp.*,[15] the Court stated:

> Rather, we understand Hanover Shoe as resting on the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge *in the direct purchasers* rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it. [431 U.S. at 734-35]

The Court's decision—to permit only direct purchasers to sue for price fixing—was designed to avoid the complex task of apportioning recovery among all potential plaintiffs. In addition, the Court recognized that Section 4 would lose its remedial force if recoveries had to be divided between all those who suffered some portion of the injury. The Court concluded:

> We think the longstanding policy of encouraging vigorous private enforcement of the antitrust laws * * * supports our adherence to the *Hanover Shoe* rule under which direct purchasers are not only spared the burden of litigating the intricacies of pass on but also are permitted to recover the full amount of the overcharge. [431 U.S. 745-746]

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[15] 392 U.S. 481 (1968).

On its facts, this case is well within the reasoning of *Illinois Brick*. McCready dealt directly with her Plan, which denied her claim for reimbursement as a result of the conspiracy. She dealt directly with a psychologist, also a victim of the conspiracy. That psychologist may have a claim for damages as to *other* patients who were coerced into seeking treatment by psychiatrists, but he has *no claim* for his treatment of McCready. There is no duplication here, nor any complex task of apportionment. Each potential plaintiff suffered the full amount of a different injury. *Illinois Brick* has been incorrectly cited by Petitioners as a bar to recovery in this case.

A final case cited in the Petition is *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, supra*, but upon more careful analysis, this case also supports the decision below. There, an acquisition occurred which *increased* competition, to the detriment of plaintiff, a company which stood to benefit from a *reduction* of competition. As the Court held, "[i]t is inimical to the purposes of these [antitrust] laws to award damages for the type of injury claimed here." 429 U.S. at 488. Antitrust recovery cannot be divorced from the purposes of the antitrust laws, and a plaintiff must prove an injury which reflects the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

The *McCready* claim represents just such an injury. The violation was a conspiracy among physician-dominated Blue Shield Plans to diminish competition between psychiatrists and psychologists. The relevant anticompetitive act pursuant to that conspiracy was anticompetitive act pursuant to that conspiracy was the refusal to reimburse McCready for her treatment by a

psychologist. McCready's injury falls clearly within *Brunswick* and to hold otherwise would seriously undermine Section 4 of the Clayton Act. The Petition asserts that McCready's losses are "unrelated to reduction of competition between psychologists and physicians," but that is just not true. McCready's loss is the *means* by which competition was reduced. As the decision below found, the Complaint alleges that defendants conspired to make it "too expensive" for Blue Shield subscribers to use psychologists.

It is no answer to say that McCready's loss is due to her employer's decision to buy a policy that did not cover psychologists, because that is not true either. The contract *did* cover the services she used. As *VACP* held, nonpayment was due to "reimbursement principles" unlawfully adopted in violation of the Sherman Act. Also, an antitrust plaintiff need not allege or prove that there was no way to avoid or sidestep the injury. Rather, it is sufficient for the plaintiff to show that the product or service used by plaintiff was affected by a violation in a manner which injured plaintiff. *Reiter* v. *Sonotone Corp., supra.*

(c) The Fourth Circuit decision does not open the door to a multiplicity of burdensome law suits.

The Petitioners assert that the Fourth Circuit has expanded the universe of potential antitrust plaintiffs, but this assertion hinges entirely on their erroneous view that:

> The Fourth Circuit in this case has adopted a rule that allows standing to any plaintiff who can establish a casual link between his injury and an antitrust violation. (Petition 20)

The Fourth Circuit limits standing to persons whose injury is "directly or proximately" caused by the violation. The Court found that McCready's loss was "immediate and direct," and it analyzed the transactions at issue to ensure that there was no possibility either of damages which are "speculative and difficult to prove" or of "multiple recoveries by different plaintiffs against the same defendants for a single injury." The decision below does not give standing to all who can allege causality, and once that point—so evident from the decision—is accepted, almost all of the Petition can be ignored.

The Petition also contains a very disturbing argument. According to Petitioners (Petition 21), there is something wrong about the fact that more than one category of injured persons might be able to file an antitrust claim. The Petitioners complain that, under the decision below, both psychologists and patients like McCready have standing to sue. But there is nothing wrong or remarkable about such a result so long as multiple or speculative recoveries are avoided. This Court has emphasized that Section 4 is to be construed to permit *full* recovery of damages, *Illinois Brick Co.* v. *Illinois, supra*. The Clayton Act has a sweeping remedial purpose and its objectives are served by allowing all of those who have been injured to sue. The Supreme Court has repeatedly admonished that Section 4 must be given a comprehensive effect:

> The Statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. * * * The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices of whomever they may be perpetrated.

Mandeville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948). *See also, Conference of Studio Unions* v. *Loew's, Inc., supra* (basic and underlying purpose of antitrust laws is to *preserve competition* and *protect consumers*).

As a matter of fact, it is not unusual for more than one class of persons to sue for an antitrust violation. Tie-in arrangements, for instance, injure *competitors* as to the tied product, who can sue under Section 4 for their injuries.[16] They also injure *purchasers* of the product, who also are familiar tie-in plaintiffs, *e.g.*, *Fortner Enterprises* v. *U.S. Steel Corp.*[17] Likewise, in a major "target area" case, where a manufacturer of automobile polish sued another manufacturer which had entered into agreements with its distributors that they not deal with the plaintiff, the Court of Appeals noted that *both* the manufacturer and distributor would be within the target area of the violation and suitable plaintiffs. *Karseal Corp.* v. *Richfield Oil Corp., supra; see also Reading Industries* v. *Kennecott Copper Corp., supra.* In short, the Clayton Act is intended to encourage complete recovery, while protecting against multiple or speculative recovery. The Petitioners would frustrate this principal goal of the Clayton Act, without fostering any valid prophylactic purpose.

In a fundamental way, the Petition seeks a rule of standing which would have ironic results, particularly on the facts of this case. As alleged in the Complaint, the conspirators here agreed to reduce competition

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[16] *E.g., Advanced Business Systems and Supply Co.* v. *SCM Corp.*, 415 F.2d 44 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

[17] 394 U.S. 495 (1969).

between psychologists and psychiatrists for the business of treating Blue Shield subscribers. The conspirators imposed an extra expense on those who chose psychologists, the disfavored providers. Had the conspiracy been totally successful, no Blue Shield subscribers would have been treated by psychologists, and all of the injury caused by the antitrust violation would have been suffered by psychologists. Fortunately, however, the conspiracy was not completely successful, and some subscribers—such as McCready—paid the extra amount charged for their exercise of free choice of providers. If such people were denied recourse under Section 4, they would have no choice but submit to anticompetitive behavior. Such a rule would make it easier, not harder, for conspirators to attain their unlawful objectives.

Petitioners' new doctrine would be totally at odds with the enforcement purpose of private antitrust suits. Private plaintiffs would have a new burden of proving that there were no available products or services unaffected by the conspiracy. The victim of a price fixing conspiracy would have to show that all products in the marketplace were subject to the fix. While antitrust enforcement objectives may not be served by a "piling on" of multiple claimants, with indirect or remote injuries, it is also not served by denying standing to those who are clearly injured in the manner represented by McCready and her fellow class members. The Fourth Circuit decision represents a reasoned analysis of the Complaint allegations, and it reflects an application of earlier cases, in the Fourth Circuit and elsewhere, which cannot be faulted. There is no conflict between the circuits, and no floodgates have been opened.

(d) Petitioners should not be allowed to reargue McCarran-Ferguson Act issues which they lost in the VACP litigation.

Petitioners have repeated (Petition 22-24) contentions which they previously made to the Fourth Circuit and to this Court. Thus, they now argue that this Court should grant a Writ of Certiorari to determine whether their conspiracy in restraint of trade is exempted from the antitrust laws under the McCarran Ferguson Act.

This contention should be rejected out of hand. Petitioners lost those arguments in the Fourth Circuit both in this case and in *VACP, supra,* and this Court denied a Writ of Certiorari in the *VACP* case, which was sought by Petitioners on McCarran Ferguson and other grounds. In short, this issue has been fully and finally determined against them, and Petitioners are collaterally estopped from attempting to relitigate these issues. *See e.g., Blonder-Tongue Laboratories* v. *University of Illinois Foundation.*[18]

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[18] 402 U.S. 313 (1971).

CONCLUSION

The decision below is correct. It produces the right result on its particular facts. The Fourth Circuit faithfully followed principles of law applied uniformly by the circuits. It did not break new ground and it was fully consistent with decisions of this Court. There is no reason to grant the Writ. The Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
(ALEXANDRIA DIVISION)

Civil Action No. 78-447A
Jury Trial Demanded

JANE DOE, individually and on behalf of all others similarly situated, Plaintiff,

v.

BLUE SHIELD OF VIRGINIA
2015 Staples Mill Road
Post Office Box 2741
Richmond, Virginia

BLUE SHIELD OF SOUTHWESTERN VIRGINIA,
1212 Third Street, S.W.
Box 2770
Roanoke, Virginia 24001; and

MEDICAL SERVICE OF THE DISTRICT OF COLUMBIA, INC.
550 12th Street, S.W.
Washington, D.C. 20024; and

NEUROPSYCHIATRIC SOCIETY OF VIRGINIA, INC.
Box 907
MCV Station
Richmond, Virginia 23298

Defendants.

COMPLAINT FOR ANTITRUST TREBLE DAMAGES AND OTHER RELIEF

Plaintiff Jane Doe brings this civil action for treble damages under the antitrust laws and for other relief and alleges as follows:

I. Jurisdiction and Venue

1. This claim arises under the antitrust laws of the United States, more particularly Section 1 of the Sherman Act, 15 U.S.C. § 1, and § 4 of the Clayton Act, 15 U.S.C. § 15, and this Court's pendant jurisdiction as hereinafter more fully appears. Jurisdiction of this Court is based upon 28 U.S.C. § 1337. Venue is proper under 15 U.S.C. § 22 and 28 U.S.C. § 1391.

II. Definitions

2. For purposes of this Complaint,

(a) "*Clinical psychologist*" shall mean a psychologist who is competent to apply the principles and techniques of psychological evaluation and psychotherapy to individual clients for the purpose of ameliorating or attenuating problems of behavioral and/or emotional maladjustment.

(b) The "*practice of clinical psychology*" shall mean the offering by an individual of his service to the public as a clinical psychologist.

(c) The phrase "*Blue Shield defendants*" refers to defendant Blue Shield of Virginia, defendant Blue Shield of Southwestern Virginia and defendant Medical Service of the District of Columbia, Inc.

(d) The term "*subscriber*" means any person who is entitled to participate in any of the benefits provided by any of the prepaid health care plans operated by the Blue Shield defendants.

III. Parties

3. Plaintiff is a natural person, a resident of Virginia, and a subscriber to one of the prepaid health care plans administered by the Blue Shield defendants. She has re-

ceived psychological services from a clinical psychologist duly licensed to practice in Virginia. Payment for the costs of such services is required under her prepaid health care plan, but except for one instance, defendant Blue Shield of Virginia has refused to reimburse her for the cost of her treatment. The refusal has been in furtherance of the unlawful conspiracy hereinafter alleged. Plaintiff will disclose her identity and such other facts as may be essential to the prosecution of this claim, but she is bringing this action under a fictitious name due to the sensitive and highly personal nature of the subject matter of this action.

4. The Blue Shield defendants are nonstock corporations which are engaged in the business of operating various plans for furnishing pre-paid health care benefits to consumers in Virginia. The Blue Shield defendants are substantial providers of pre-paid health care plans to consumers in Virginia. Such plans are contracted-for by individuals, governmental entities (including the Commonwealth of Virginia) and business concerns. Such contractholders make payments to the Blue Shield defendants who in turn undertake to provide benefits for health care services, rendered by participating and non-participating practitioners to subscribers. The majority of such plans cover or include the kind of services performed by clinical psychologists when those services are rendered and billed by a physician.

5. Defendant Blue Shield of Virginia serves part of western Virginia and all of eastern and central Virginia, except for those portions of northern Virginia which are served by defendant Medical Services of the District of Columbia.

6. Defendant Blue Shield of Southwestern Virginia serves all of the southern and part of the western portions of Virginia.

7. Defendant Medical Services of the District of Columbia, Inc., in addition to serving the District of Columbia, serves portions of northern Virginia.

8. Defendant Neuropsychiatric Society of Virginia, Inc. (NSV) is a not-for-profit nonstock corporation whose members are psychiatrists who practice in Virginia. One objective of NSV is to serve and promote the interests of psychiatrists in Virginia and NSV seeks to fulfill this purpose in a number of ways, including communications with the Blue Shield defendants, their agents and representatives concerning payment by the Blue Shield defendants for services rendered to subscribers by clinical psychologists.

9. All defendants either maintain offices, transact business, or are found themselves or through their agents in the Eastern District of Virginia, and the claims arose in the Eastern District of Virginia.

IV. Class Action Allegations

10. Plaintiff Jane Doe brings this action under Rule 23 of the Federal Rules of Civil Procedure on her own behalf and on behalf of all other subscribers who have incurred costs for psychological services rendered by clinical psychologists during the period 1973 to the date of class certification herein but who have not been reimbursed for such costs under applicable prepaid health care plans administered by defendants. For purposes of this Complaint an "applicable" plan is a plan under which payments for psychological services are made when those services are rendered by a physician.

11. This is brought as a class action because the members of the class, the exact size of which is presently unknown to plaintiff, are so numerous that joinder of all members is impractical, because there are questions of law or fact common to the class, because the claim of the representative party is typical of the claims of the class,

and because the representative party will fairly and adequately protect the interests of the class.

12. This action is maintainable by plaintiff Jane Doe under Rule 23(b)(3) as a class action because the questions of law and fact common to the members of the class predominate over any questions affecting only individual members.

13. Plaintiff is an adequate representative of the class in that her claims are typical of the claims of all class members and she has no interest antagonistic to or in conflict with the interests of other class members. Plaintiff will adequately represent the interests of the class.

14. Class action adjudication is superior to other available methods for the fair and efficient adjudication of the controversy in that neither plaintiff nor other members of the class have enough at stake personally to warrant individual prosecution of their claims against these corporate defendants, and therefore a class action will be the only means of protecting the rights of members of the class. Further, it is desirable to concentrate the litigation of such claims in this forum, and there are no difficulties likely to be encountered in the management of the class action.

IV. Co-Conspirators

15. On information and belief, various persons, corporations, professional associations and other entities not made defendants herein, participated as co-conspirators in the violations hereinafter alleged and performed acts and made statements in furtherance thereof.

V. General Allegations

16. Clinical psychologists compete with psychiatrists in the rendering to patients of psychological services including psychotherapy.

17. A psychiatrist needs no special license to practice psychiatry, but rather is a physician licensed to practice medicine in Virginia. All physicians who apply for certificates to practice medicine take the same examination, regardless of the specialty in which they desire to practice.

18. The Blue Shield defendants are the dominant providers of pre-paid health care plans covering consumers in Virginia. The Blue Shield defendants compete with various health insurance companies and other business concerns many of which are located outside of Virginia and which also provide prepaid health care and health insurance plans to consumers of medical services, including the services of clinical psychologists.

19. The Blue Shield defendants are members of and licensed by the National Association of Blue Shield Plans ("National Association"). Under such licenses, the Blue Shield defendants obtain the right to use the "Blue Shield" trademark and name. The National Association serves as a coordinating agency for the Blue Shield plans throughout the United States and provides other services to the Blue Shield plans.

20. The Blue Shield plans throughout the United States, including the Blue Shield defendants, have arrangements with one another regarding transfers of subscribers, underwriting of risks and other aspects of their business. The National Association has contracts for the administration of various federal prepaid medical services programs, but the administration of such programs is delegated to the local Blue Shield plans, including the Blue Shield defendants herein. Such programs administered by the Blue Shield defendants include the Federal Employment Health Benefit Program, (5 U.S.C. § 8901 *et seq.*), Part A of the Medical Program (42 U.S.C. §§ 1395c *et seq.*) and the Civilian Health and Medical Program of the Uniformed Services ("CHAMPUS"). The National Association has similar arrangements for the management and administration of

various nation-wide plans subscribed to by major corporations for the benefit of their employees located throughout the United States.

21. The Blue Shield defendants are governed by Boards of Directors. The Boards of Directors of the Blue Shield defendants traditionally have been dominated by physicians, who substantially influence and control the policies and practices adopted by the Blue Shield defendants.

VI. Trade and Commerce

22. The activities of the defendants, as set forth herein, are within the flow of interstate commerce or have an effect upon interstate commerce in at least the following respects:

(a) Clinical psychologists in Virginia treat substantial numbers of patients who travel into Virginia from out of state for treatment. They receive regular and substantial payment for services from out-of-state insurance companies. They receive regular and substantial payments, which originate out-of-state, from the federal government acting through the Blue Shield defendants for treatment of CHAMPUS and Medicare patients and for treatment of patients under other programs underwritten or paid for by the federal government. They also purchase substantial quantities of supplies and equipment from out-of-state sellers.

(b) Clinical psychologists in Virginia are hampered by the acts of defendants as alleged hereinafter in their ability to compete in the provision of psychological services to substantial numbers of Virginia and out-of-state patients, and their revenues from such patients are reduced, as is their ability to purchase out-of-state supplies and equipment.

(c) The acts and practices of defendants adversely affect the volume of psychological services provided throughout the Commonwealth of Virginia, and such acts

and practices reduce payments for services rendered by clinical psychologists to consumers whose prepaid health benefits are contracted-for by out-of-state entities.

(d) The acts and practices of defendants increase the cost of psychological services to substantial numbers of persons who travel in interstate commerce for such treatment, and the acts and practices of defendants tend to increase the cost of psychological services rendered to subscribers under both Virginia and out-of-state contractholders' prepaid health care service plans.

(e) Subscription fees and premiums are paid to Blue Shield defendants and other Virginia providers of pre-paid health care benefits by and on behalf of persons located out-of-state, and the acts and practices of defendants affect the amount and the distribution of the moneys represented by such fees and premiums.

(f) Fees for psychological services provided by clinical psychologists and by psychiatrists are paid into Virginia by out-of-state patients and health insurance companies.

(g) The Blue Shield defendants make substantial payments for covered health care services rendered to subscribers by practitioners located outside of the Commonwealth of Virginia; and they deny payments for psychological services rendered to subscribers by clinical psychologists located outside of the Commonwealth of Virginia.

(h) The Blue Shield defendants purchase substantial goods and services in interstate commerce, and the Blue Shield defendants engage in susbtantial interstate activities in cooperation and coordination of underwriting and other functions, including administration of nation-wide pre-paid health care plans with various out-of-state entities, including other Blue Shields and the National Association.

(i) The unlawful acts and practices of defendants as alleged herein affect not only the Blue Shield defendants

but also the interstate health insurance companies and business concerns compete with the Blue Shield defendants.

VIII. Violations Alleged

Count I (Federal Antitrust Law)

23. Plaintiffs repeat the allegations of paragraphs 1 through 22 as if fully set forth herein.

24. When psychological services including psychotherapy are rendered by a psychiatrist those services are covered by most of the plans operated by the Blue Shield defendants. When the same services are rendered by a clinical psychologist to persons under the same plans, those services are not paid by the Blue Shield defendants unless such services are billed to Blue Shield through a physician.

25. Beginning at least as early as 1971 and continuing to date, the defendants and co-conspirators have continuously engaged in an unlawful combination and conspiracy and unreasonable restraint of the aforesaid trade and commerce in violation of Section 1 of the Sherman Act as amended, 15 U.S.C. Section 1. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants and conspirators, the substantial terms of which have been to exclude and boycott clinical psychologists from receiving compensation under pre-paid health care plans in connection with the furnishing of psychological services including psychotherapy to subscribers to such plans.

26. The aforesaid concerted refusal by the Blue Shield defendants to pay for the services rendered by clinical psychologists to the holders of the Blue Shield pre-paid medical services plan contracts is a violation of the requirement under Virginia law that "[n]o plan for furnishing prepaid medical and surgical, and similar or re-

lated services, or any of such services, shall fail or refuse, either directly or indirectly, to allow or to pay for such services, or any part thereof, rendered by any . . . psychologist duly licensed to practice in Virginia," where the services rendered "are services provided for by such contract," and "are services which the . . . psychologist is licensed to render in Virginia." Code of Virginia § 32-195.10-1 (Cum. Supp. 1977).

27. As a further consequence of the acts and practices described hereinabove:

(a) clinical psychologists have been hindered in the providing of psychological services, including psychotherapy, to patients; and

(b) psychiatrists have gained an unlawful competitive advantage over clinical psychologists in the provision of psychological services to patients;

(c) patients have been economically coerced to receive psychological services from psychiatrists rather than clinical psychologists; and

(d) the public has been denied the benefit of free and open competition between clinical psychologists and psychiatrists in the provision of psychological services to patients.

28. Plaintiff and the members of plaintiff's class have incurred various costs for psychological services rendered to them by clinical psychologists during the period commencing in 1973 and continuing. Plaintiff Jane Doe and other members of the class are subscribers to applicable prepaid health care plans adopted and administered by the Blue Shield defendants. Under those plans, the Blue Shield defendants are obligated to reimburse plaintiff and other members of the class for the costs they have incurred in obtaining psychological services. In furtherance of and as a direct result of the unlawful combination

and conspiracy to boycott as hereinabove alleged, the Blue Shield defendants have unlawfully refused, and continue to refuse, to reimburse plaintiffs for such costs, because psychological services were rendered to them by clinical psychologists rather than physicians. The foregoing violations by the defendants have injured plaintiff Jane Doe and the members of the class in their business and property and have caused them substantial damages, the full extent of which are not yet known.

Count II (Breach of Contract)

29. Plaintiff repeats and realleges each and every allegation set forth in Paragraphs 2 through 28 above with the same effect as though fully set forth herein.

30. The claims set forth herein derive from a common nucleus of operative fact and arise under this Court's pendant jurisdiction.

31. Plaintiff and the members of plaintiff's class are subscribers to prepaid health care plans adopted and administered by the Blue Shield defendants and thus stand in a contractual relationship with those defendants. Under such plans, the Blue Shield defendants are obligated by law to provide for payment on behalf of, or reimbursement to, subscribers for psychological services received from clinical psychologists wherever those services would be covered when rendered and billed by a physician. Notwithstanding this requirement, the Blue Shield defendants have consistently refused to make such payments or reimbursements for psychological services rendered by clinical psychologists, and such refusal has been and is in breach of their contracts with subscribers, which incorporate the applicable statutory provisions by operation of law.

32. As a direct and proximate result of the breach of contract hereinabove alleged, plaintiff has suffered damages the full extent of which cannot be presently calculated.

33. The plaintiff and all other class members are similarly situated, in that all class members have similar plans in the pertinent respects and the acts of defendants have applied to and injured all class members equally.

IX. Prayer for Relief

WHEREFORE, plaintiffs demand

(1) As to Count I:

(a) That the Court adjust and decree that the defendants and co-conspirators have engaged in unlawful combination and conspiracy in restraint of the aforesaid trade and commerce in violation of Section 1 of the Sherman Act, as amended (15 U.S.C. § 1);

(b) That the Court award judgement against defendants jointly and severally for threefold the damages sustained by plaintiffs and all other members of the class;

(c) That plaintiffs be awarded the costs and expenses of the litigation, including attorneys' fees;

(d) That the Court order such other and further relief as may be deemed just and proper.

(2) As to Count II:

(a) That the Court award judgement declaring the acts of the Blue Shield defendants to be in breach of contract;

(b) That the Court award plaintiff and members of the class their damages plus costs and attorneys' fees; and

(c) That the Court order such other and further relief as may be deemed just and proper.

Respectfully submitted,

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Jury Demand

Plaintiffs hereby demand a trial by jury on all issues of law herein.

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Petitioner's Reply Brief

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No. 81-225

IN THE

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OCTOBER TERM 1981

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BLUE SHIELD OF SOUTHWESTERN VIRGINIA

and

NEUROPSYCHIATRIC SOCIETY OF VIRGINIA, INC.,
Petitioners,

v.

CAROL MCCREADY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

Petitioners submit this Reply Brief to show that this case is appropriate for certiorari, notwithstanding the Brief in Opposition of Respondent McCready. There is a serious conflict among the Circuits on a fundamental issue of antitrust law that has never been decided by this Court.

I. The Fourth Circuit in this Case Rejected the Established "Target Area" Rule

In her Brief in Opposition, McCready states that:

> The Clayton Act has a sweeping remedial purpose and *its objectives are served by allowing all of those who have been injured to sue.*[1]

This is the erroneous rule of law for which McCready is contending and which the Fourth Circuit adopted in its opinion below. The Fourth Circuit held as follows:

> Section 4 of the Clayton Act affords relief to "[a]ny person . . . injured in his . . . property by reason of anything forbidden in the antitrust laws. . . ." By its terms the Act does not restrict standing to competitors who are the targets of anticompetitive behavior. *It encompasses "any person" whose property loss is directly or proximately caused by violation of the law.* McCready satisfies these requirements.[2]

The Fourth Circuit then described the established target area test as mere "catch words."[3]

The Fourth Circuit in fact rejected the "target area" rule and replaced it with a rule that allows standing to plaintiffs who have suffered only indirect injury. Although the Fourth Circuit uses the words "directly or proximately," McCready's injury is clearly indirect because the alleged conspiracy was not directed at McCready.[4] Her injury was merely the collateral result of an alleged conspiracy directed at clinical psychologists. Therefore, the Fourth Circuit would allow "all of those who have been injured to sue."[5] This unwise rule is

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[1] Brief in Opposition 22 (emphasis added).

[2] Appendix to Petition for Certiorari 19a-20a (citations omitted, emphasis added).

[3] *Id.* 20a.

[4] McCready concedes the alleged conspiracy was not directed at her. Brief in Opposition 1, 5.

[5] Brief in Opposition 22.

contrary to decisions of other Circuits and conflicts with principles of antitrust standing announced by this Court.

II. The Decision of the Fourth Circuit Is in Conflict with the Decisions of Other Circuits

McCready claims that "the courts of appeal have produced a body of law which, although sometimes cast in different language, produces consistent and rational results in a great variety of factual situations."[6] McCready certainly stands alone in describing the current state of the law of antitrust standing as "consistent and rational." In *GAF Corporation* v. *Eastman Kodak Company*,[7] District Judge Pierce recently reviewed the conflicting tests adopted by the various Circuits and stated:

> In addition, the Court notes that commentators in this area, while offering different approaches to the standing question, are generally in agreement *that the law is in a state of flux and confusion.*[8]

Furthermore, despite McCready's argument to the contrary,[9] the decision of the Fourth Circuit here is simply at odds with the decision of the Second Circuit in *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*[10] In *Calderone*, the Second Circuit's holding was unmistakable:

> [W]e have drawn a line *excluding* [for purposes of standing] those who have suffered economic damage *by virtue of their relationships with "targets" or with participants in an alleged antitrust conspiracy*, rather than by being "targets" themselves.[11]

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[6] *Id.* 9.

[7] Antitrust & Trade Reg. Rep. (BNA) (Aug. 13, 1981) F-1 (S.D. N.Y. Aug. 3, 1981).

[8] *Id.* F-8 n. 9.

[9] Brief in Opposition 9-11.

[10] 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

[11] *Id.* 454 F.2d at 1295 (emphasis added).

This is precisely McCready's situation. The "injury" she alleges results from her relationships with a psychologist (a "target" of the supposed conspiracy) and with the Richmond Plan (a putative conspirator). Thus, McCready would lack standing under the rule in *Calderone.*

McCready cites *Schwimmer* v. *Sony Corp.*,[12] and *Reading Industries, Inc.* v. *Kennecott Copper Corp.*,[13] but neither of these decisions altered the rule adopted in *Calderone* in any way. In both *Schwimmer* and *Reading*, the plaintiffs were denied standing under § 4 of the Clayton Act through application of the "target area" rule. Indeed, the Court in *GAF Corporation* discussed both *Schwimmer* and *Reading* and concluded that "in summary, the Second Circuit appears to have adhered to the narrower target area test for standing in its recent opinions." [14] *Schwimmer* and *Reading* only underline the serious conflict among the Circuits presented by this Petition for Certiorari.

McCready claims that she should have standing under the "target area" rule because she is within the sector of the economy threatened by the breakdown of competitive conditions.[15] The flaw in this argument is that, as the District Court noted, McCready was operating in a market that was "unrestrained insofar as she is concerned."[16] This is true with respect to both of the markets in which McCready could claim to be present. First,

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[12] 637 F.2d 41 (2d Cir. 1980).

[13] 631 F.2d 10 (2d Cir. 1980), *cert. denied*, —— U.S. ——, 69 L.Ed.2d 420 (1981).

[14] Antitrust & Trade Reg. Rep. (BNA) (Aug. 13, 1981) F-1, at F-9 (S.D.N.Y. Aug. 3, 1981).

[15] Brief in Opposition 11.

[16] Appendix to Petition for Certiorari 6a.

as the District Court said, "[t]here is no suggestion that the plaintiff [McCready] cannot obtain insurance coverage for psychological treatment from insurance carriers other than the [Plans]." [17] Thus, McCready's employer, in buying her contract from the Richmond Plan, was not operating in a sector of the economy threatened by a breakdown of competitive conditions. Second, McCready, in purchasing treatment from a psychologist, was not affected by any reduction in competition between psychologists and psychiatrists. There is no allegation in her complaint that the alleged boycott unlawfully increased the price of clinical psychologists' services or that McCready was hindered in finding a psychologist to treat her. Thus, in neither of the markets involved in this case was McCready faced with a "breakdown of competitive conditions," and under a correct application of the "target area" rule McCready should lack standing.

III. The Fourth Circuit's Decision Is in Conflict with this Court's Recent Decisions under § 4 of the Clayton Act

In their Petition for Certiorari, the Plans and NSV argued that the Fourth Circuit's decision here is contrary to the principles governing standing and antitrust injury announced in recent decisions of this Court.

The most significant of these principles is that a plaintiff should be denied standing where the plaintiff's "injury" results from the independent decision of a middleman who is not involved in the antitrust violation.[18] Ex-

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[17] *Id.*

[18] *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977). *See* Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 Colum. L. Rev. 979, 1000 (1977) ("[A]s a matter of proximate cause, the prices paid by an indirect purchaser in an unrestrained and untainted market should be regarded as the result of the direct buyer's independent pricing decision rather than of the defendants' illegal actions") (note omitted).

tended to McCready, this principle requires that she be denied standing, because her injury results from the independent decision of her employer in selecting a group health contract that did not cover the services of psychologists.

McCready attempts to avoid this principle by introducing a ludicrous dispute over whether the terms of her contract covered psychologists. Both McCready's complaint and the decision of the Fourth Circuit show that the contract did *not* cover psychologists. The Fourth Circuit stated:

> From September 1975 until January 1978, McCready, an employee of Prince William County, Virginia, was a subscriber to one of the health care plans administered by Blue Shield. The county provided its employees group coverage purchased from Blue Shield of Virginia. That group plan provided for reimbursement to subscribers for treatment by psychiatrists, or by psychologists whose services were supervised and billed by a treating physician. No reimbursement was allowed for treatment by psychologists unless billed through a treating physician.[19]

McCready alleged that the contract included services rendered directly by a psychologist because of a Virginia statute that required such contracts to include psychologists' services.[20] In her Brief in Opposition, McCready neglected to point out that this Virginia statute has been held unconstitutional by the Virginia Supreme Court.[21]

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[19] Appendix to Petition for Certiorari 16a.

[20] Appendix to Brief in Opposition A-11 (Complaint ¶ 31).

[21] *Blue Cross of Virginia* v. *Commonwealth*, 221 Va. 372, 269 S.E.2d 827 (1980). The Court held the statute unconstitutional for the period before a remedial amendment became effective in July 1979. For the period before July 1979, therefore, the statute was a nullity and did not operate to include psychologists under the coverage of the Plans' contracts.

For these reasons, it is absolutely indisputable that the contract between Prince William County and the Richmond Plan did *not* cover the services of a psychologist. As a result, McCready's "injury" was the result of an independent decision by a middleman (Prince William County) to purchase a contract that did not cover psychologists. As the District Court pointed out, "[t]here is no suggestion that the plaintiff [McCready] cannot obtain insurance coverage for psychological treatment from insurance carriers other than the defendant providers." [22]

A second important principle announced by this Court in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*[23] is that an antitrust plaintiff must prove that his injury is related to a reduction in competition caused by the antitrust violation and is thus an injury of the type the antitrust laws were "intended to forestall." [24] McCready's "injury," however, was not caused by any reduction in competition among psychiatrists and psychologists (the claimed anticompetitive effect of the alleged violation). Indeed, for McCready to recover in this case would be a mere accident, unrelated to the purposes of the antitrust laws, because she would have incurred the same "injury" without any boycott so long as her employer declined to select a group health contract that covered psychologists.

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[22] Appendix to Petition for Certiorari 6a.

[23] 429 U.S. 477 (1977).

[24] 429 U.S. at 488, *quoting from Wyandotte Co.* v. *United States*, 389 U.S. 191, 202 (1967). McCready twice states that an added cost or surcharge was imposed on her treatment by a psychologist. Brief in Opposition 6, 24. This is nonsense. The group health contract purchased by McCready's employer did not cover psychologists, and so obviously she was not reimbursed for her treatment by a psychologist. No added cost or surcharge was or could have been imposed.

IV. The Plans and NSV Are Not Estopped to Assert the McCarran-Ferguson Act Exemption

This case presents a dispute between a policyholder and her insurance carrier over the terms of a health insurance policy. In this respect, this case is different from either *Group Health & Life Insurance Co.* v. *Royal Drug Co.*[25] or *Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia.*[26] The relationship between a policyholder, such as McCready, and her carrier, in this case the Richmond Plan, goes to the core of the "business of insurance." The Fourth Circuit did not address this issue here, and the Plans and NSV are certainly not estopped to assert the McCarran-Ferguson Act exemption.

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[25] 440 U.S. 205 (1979).

[26] 624 F.2d 476 (4th Cir. 1980), *cert. denied*, —— U.S. ——, 67 L.Ed. 2d 342 (1981). *See* Comment, *The Scope of the "Business of Insurance" Provision of the McCarran-Ferguson Act: Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia*, 65 Minn.L.Rev. 1187 (July 1981).

V. Conclusion

For the reasons stated in the Reply Brief, and in the Petition for Certiorari, the Writ of Certiorari should be granted and the decision of the Fourth Circuit reversed.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a subscriber to a prepaid health care plan, purchased by her employer in an unrestrained insurance market, has standing under § 4 of the Clayton Act to complain that the plan is boycotting clinical psychologists by failing to cover their services?

2. Whether the term of a health insurance contract that limits coverage to services performed by physicians is exempt from the antitrust laws as part of the "business of insurance" within the meaning of § 2 of the McCarran-Ferguson Act, where plaintiff does not allege a "boycott" within the meaning of § 3(b) of the McCarran-Ferguson Act?

PARTIES

The caption of this brief contains the names of all parties to this action in the Fourth Circuit. One defendant, Medical Service of the District of Columbia, Inc., was dismissed by the district court and was not a party in the Fourth Circuit. The information required by Rule 28.1 of the Rules of this Court is contained in the Petition for Certiorari.

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No. 81-225

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BLUE SHIELD OF VIRGINIA,
BLUE SHIELD OF SOUTHWESTERN VIRGINIA

AND

NEUROPSYCHIATRIC SOCIETY OF VIRGINIA, INC.,
Petitioners,

v.

CAROL MCCREADY, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The unreported opinion of the United States District Court for the Eastern District of Virginia dated October 10, 1978 is set out in the Joint Appendix ("J.A.") at 13. The opinion of the Fourth Circuit is reported at 649 F.2d 228 (4th Cir. 1981) and is also set out at J.A. 26.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Fourth Circuit entered its judgment on May 12, 1981. J.A. 26. Blue Shield of Virginia (the "Richmond Plan"), Blue Shield of Southwestern Virginia (the "Roanoke Plan") and the Neuropsychiatric Society of

Virginia, Inc. ("NSV") filed a timely petition for rehearing and suggestion for rehearing *in banc* on May 26, 1981, which the Fourth Circuit denied on July 2, 1981. J.A. 45. The petition for writ of certiorari was filed on August 3, 1981, and this Court granted certiorari on November 2, 1981.

STATUTES INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in relevant part as follows:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Sections 2 and 3(b) of the McCarran-Ferguson Act, 15 U.S.C. §§ 1012 and 1013(b), are set out in the Appendix to this brief. Section 38.1-822.1 of the Code of Virginia is also set out in the Appendix to this brief.

STATEMENT OF THE CASE

(A) Summary

Respondent Carol McCready ("McCready") brought this antitrust action in July 1978, and alleged that the Richmond Plan, the Roanoke Plan,[1] and NSV had conspired "to exclude clinical psychologists from receiving compensation under [the Plans'] prepaid health care plans in violation of Section 1 of the Sherman Act."[2] The district court dismissed McCready's complaint because she lacked standing and because she had not sustained "antitrust

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[1] The Richmond Plan and the Roanoke Plan together will be referred to as the "Plans."

[2] McCready complaint ¶ 25; J.A. 55.

injury."[3] The Fourth Circuit reversed and held that McCready had standing to sue under § 4 of the Clayton Act.

In both the district court and the Fourth Circuit, the Plans and NSV asserted that the terms of coverage in the Plans' insurance contracts attacked by McCready in her complaint were the "business of insurance" under the McCarran-Ferguson Act and hence exempt from the antitrust laws. The district court stated in dictum that the exemption was not available because the terms of coverage were a boycott.[4] The Fourth Circuit did not rule on or discuss the McCarran-Ferguson Act issue.

(B) The Plans and NSV

The Plans are nonprofit, nonstock Virginia corporations organized under a special Virginia enabling statute.[5] The Plans, like Blue Shield plans nationwide, contract with their subscribers, or with employers, to provide prepaid health insurance. The Plans are subject to extensive and detailed regulation by the Bureau of Insurance of the Virginia State Corporation Commission (the "SCC").[6] By statute the SCC assigns each Plan a specific geographic territory, and each Plan is prohibited from selling coverage to persons who do not live or work in its territory.[7] Thus, by statute the Plans cannot compete with each other, but each Plan is in direct competition with the hundreds of commercial health insurers doing business in Virginia.[8]

NSV is a nonstock, nonprofit Virginia corporation and is a professional association of psychiatrists in Virginia.

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[3] J.A. 18.

[4] J.A. 19.

[5] Va. Code § 38.1-811.

[6] Va. Code §§ 38.1-811 to 38.1-833.

[7] Va. Code § 38.1-822.1 (contained in appendix to this brief).

[8] McCready complaint ¶ 18; J.A. 52.

(C) McCready's Health Insurance Contract

From August 1975 through December 1977, McCready was an employee of Prince William County, Virginia. Prince William County provided its employees with a group subscriber health insurance contract purchased from the Richmond Plan. This insurance contract by its terms covered only specified "medically necessary services performed or prescribed . . . by a Physician."[9] Among the specified services were "Services of Physicians." Clinical psychologists are not physicians.[10]

Although the Plans' insurance contracts by their literal terms covered medically necessary physicians' services, the Plans interpreted the insurance contracts more broadly to include treatment of subscribers by clinical psychologists where: (1) a physician supervised the clinical psychologist's treatment of the subscriber; and (2) the clinical psychologist's bill was submitted to the Plan by the physician.[11] In this brief, these conditions are referred to as the "physician supervision requirement."

The Plans adopted this requirement to ensure that they reimbursed subscribers only for treatment by clinical psychologists that was medically necessary, as required by the contracts. There are many medical procedures, such as cosmetic surgery, that are not medically necessary. Similarly, there are instances where psychotherapy by a clinical psychologist would not be medically necessary. The physician supervision requirement made certain that a medical judg-

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[9] J.A. 66.

[10] *Compare* Va. Code § 54-273(10) (clinical psychologists) *with* Va. Code § 54-273(3) (medical doctors).

[11] The Fourth Circuit's discussion implies that these requirements were express terms of the insurance contracts. J.A. 28. Although the point is not critical to this case, the fact is that the Plans adopted these requirements as an interpretation of the insurance contracts.

ment would always be made that psychotherapy was medically necessary. This medical judgment could be made only by a physician.

While an employee of Prince William County, McCready submitted claims to the Richmond Plan for the services of a clinical psychologist. Since these services were not performed or supervised by a physician, they were not covered by the insurance contract purchased by Prince William County. For this reason, the Richmond Plan denied the claims.

(D) The Allegations in McCready's Complaint

The precise allegations in McCready's complaint are critical because this case comes to this Court on a motion to dismiss under Fed.R.Civ.P. 12(b)(6). McCready alleged a conspiracy among the Plans and NSV, the "substantial terms" of which were as follows:

> [T]o exclude and boycott clinical psychologists from receiving compensation under prepaid health care plans in connection with the furnishing of psychological services including psychotherapy to subscribers to [the] plans.[12]

The conspiracy alleged by McCready, therefore, was a conspiracy among the Plans and NSV to boycott clinical psychologists, *not* to boycott or injure McCready or other subscribers.

McCready alleged that she was injured by this conspiracy because the Plans have refused to reimburse her for the cost of psychological services "because [the] psychological services were rendered to [McCready] by clinical psychologists rather than physicians."[13]

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[12] McCready complaint ¶ 25; J.A. 55.

[13] *Id.*, ¶ 28; J.A. 56.

There is no allegation in the complaint that the alleged boycott increased the price to McCready of clinical psychologists' services or that the alleged boycott hindered McCready in finding a clinical psychologist to treat her. There is no allegation in the complaint of any restraint of trade in the market for health insurance. Indeed, the district court noted that "[t]here is no suggestion that [McCready] cannot obtain insurance coverage for psychological treatment from insurance carriers other than [the Plans]."[14]

McCready claims to represent a class, pursuant to Fed. R.Civ.P. 23, of those persons in Virginia who were subscribers to the Plans and who incurred costs for treatment by clinical psychologists since 1973. On behalf of this class, McCready seeks damages of three times the costs incurred for such treatment (which was not covered by the Plans' insurance contracts), plus attorneys' fees. No ruling has yet been made on the certification of the class McCready claims to represent.

(E) The District Court's Decision

In the district court, the Plans and NSV moved to dismiss McCready's complaint on the grounds, *inter alia*, that McCready lacked standing under § 4 of the Clayton Act to assert the antitrust claim alleged in her complaint, and that the terms of coverage in the insurance contracts challenged by McCready were exempt from the antitrust laws by virtue of the McCarran-Ferguson Act. The district court, Judge Albert V. Bryan, Jr., granted the motion, dismissed the complaint, and held that McCready did not have standing because she lacked antitrust injury:

> [McCready's] standing depends upon whether her injury was suffered within the sector of the economy competitively endangered by the defendants' alleged violations of the antitrust laws. . . . [P]sychologists]

[14] J.A. 18.

> are the ones allegedly being boycotted, not [McCready]. . . . [McCready] may have suffered an injury by being unable to collect insurance from one of the defendants, but this injury is too indirect and remote to be considered "antitrust injury" . . . . While standing and antitrust injury may or may not be treated as the same issue, in this case [McCready] does not have the former because she has not sustained the latter. Accordingly, her complaint must be dismissed.[15]

The district court also stated in dictum that the McCarran-Ferguson exemption was unavailable because McCready had sufficiently alleged a boycott of clinical psychologists under § 3(b) of the McCarran-Ferguson Act.[16]

(F) The Fourth Circuit's Decision

On appeal, a divided Panel of the Fourth Circuit reversed. The majority of the Panel conceded that McCready's complaint alleged a conspiracy directed not at her, but at clinical psychologists. Nonetheless, according to the majority, McCready has standing under § 4 of the Clayton Act. The majority announced the following test for antitrust standing:

> [Section 4 of the Clayton Act] encompasses "any person" whose property loss is directly or proximately caused by violation of the law. McCready satisfies these requirements. Her injury was immediate and direct. Although denial of reimbursement was designed to divert her and other subscribers from psychologists to psychiatrists, this goal does not make her loss too remote or indirect to be covered by [§ 4 of the Clayton] Act.[17]

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[15] *Id.*

[16] J.A. 19.

[17] J.A. 31-32.

The majority went on to describe the long-established "target area" rule[18] for antitrust standing as mere "catch words."[19]

In dissent, Judge Widener pointed out that the "target area" rule, which was in effect rejected by the majority, restricts antitrust standing to plaintiffs in the sector of the economy at which the alleged antitrust violation is directed. Under this rule, McCready lacks antitrust standing, because "even [she] does not describe her injury as a design or goal of any antitrust violation, rather as a consequence thereof."[20] Judge Widener explained his reasoning as follows:

> I would hold that plaintiff does not satisfy the requirement of § 4 that she be injured "by reason of" a violation of the antitrust laws. *She does not claim that the actions of the Blue Shield defendants were aimed at injuring any group beyond the psychologists.* The psychologists make up the group within the sector of the economy in which the illegal conduct of the Blue Shield defendants threatens to break down competitive conditions. *Any injury to Miss McCready is too indirect and consequential to be actionable under § 4 of the Clayton Act. As the district court said, she operated in a market which was unrestrained so far as she was concerned.*[21]

Neither the majority nor the dissent addressed the McCarran-Ferguson issue, which the Plans and NSV had argued on appeal as an alternative ground for affirming the dismissal of McCready's complaint.[22]

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[18] *See, e.g., Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

[19] J.A. 32.

[20] J.A. 34.

[21] J.A. 38 (Emphasis added).

[22] Brief for Appellees, 23-34.

(G) Related Litigation

On the same day McCready filed her complaint in this case, a similar complaint was filed in the same court against the same defendants by the Virginia Academy of Clinical Psychologists ("VACP") and its president, Robert J. Resnick ("Resnick"). The material allegations in the two complaints are identical. After trial, the district court entered judgment for the Plans and NSV. The Fourth Circuit reversed as to the Plans.[23] This Court denied certiorari.[24]

VACP and Resnick, in their complaint, sought only injunctive and declarative relief. In early October 1981, however, Resnick and four other clinical psychologists filed actions in the Eastern District of Virginia against the Plans (but not NSV) seeking damages under § 4 of the Clayton Act for the same antitrust violations alleged by VACP and Resnick in their original complaint and by McCready in her complaint.[25]

There was one other related action, which is now concluded. In 1973, Virginia enacted a statute[26] that purported to require the Plans (but not commercial health insurance companies) to reimburse for treatment by clinical psychologists, as well as other non-physician providers. The SCC brought an administrative action alleging that the Richmond Plan was not complying with the statute. The Rich-

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[23] *Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia*, 469 F. Supp. 552 (E.D.Va. 1979), *rev'd in part and aff'd in part*, 624 F.2d 476 (4th Cir. 1980), *cert. denied*, 101 S.Ct. 1360 (1981) (hereinafter cited as *VACP*).

[24] 101 S.Ct. 1360 (1981).

[25] *Robert G. Gibby & Robert G. Gibby, Jr., Ltd.* v. *Blue Shield of Virginia*, No. 81-1058-D-R (E.D.Va.); *Gordon* v. *Blue Shield of Virginia*, No. 81-1058-B-R (E.D.Va.); *Mulligan* v. *Blue Shield of Virginia*, No. 81-1058-C-R (E.D.Va.); and *Resnick* v. *Blue Shield of Virginia*, No. 81-1058-A-R (E.D.Va.).

[26] Former Va. Code § 32-195.10:1 (now Va. Code § 38.1-824).

mond Plan contended that the statute was unconstitutional. The SCC ruled against the Richmond Plan, but on appeal the Virginia Supreme Court held that the statute was unconstitutional for the period before a remedial amendment was enacted in 1979.[27] The 1979 remedial amendment extended the statute to all health insurers in Virginia.[28] The Plans now fully comply with the statute and reimburse clinical psychologists on the same basis as physicians.

SUMMARY OF ARGUMENT

McCready's complaint must be dismissed for two separate reasons:

(1) McCready lacks standing under § 4 of the Clayton Act; and

(2) The term of coverage in the Plans' insurance contracts, which is the gravamen of McCready's complaint, is exempt from the antitrust laws under the McCarran-Ferguson Act.

These points are summarized in turn below:

(1) *McCready lacks standing under § 4 of the Clayton Act.* McCready lacks standing under § 4 of the Clayton Act because she has not, and indeed cannot, allege injury caused by a reduction in competition or a restriction of consumer choices in the marketplace. This Court has never announced a definite rule of standing under § 4, but this

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[27] *Blue Cross of Virginia* v. *Commonwealth*, 221 Va. 349, 269 S.E.2d 827 (1980).

[28] The 1979 amendment was to Va. Code § 38.1-360. This amendment made Va. Code § 38.1-347.1 applicable to group policies of insurance issued by commercial health insurance companies. Before 1979, Va. Code § 38.1-347.1, which requires reimbursement for psychotherapy performed by clinical psychologists, did not apply to group policies of insurance, which are the vast majority of such policies issued.

Court's decisions make clear that recovery of punitive treble damages must be restricted to those cases where the policies of the antitrust laws are directly implicated. This is not such a case.

The only injury alleged by McCready is that the Richmond plan refused to reimburse her for the cost of treatment by a clinical psychologist (which was not covered by the terms of her insurance contract). Since the Plans are prohibited by a Virginia statute from competing with one another, *no* agreement between the Plans could have the effect of suppressing competition in the market for health insurance. Thus, as the district court noted, the market for health insurance was unrestrained. For this reason, McCready's "injury"—the lack of reimbursement under her insurance contract—was not caused by any restriction of competition in the health insurance marketplace. Consequently, McCready lacks standing.

In addition, since McCready's health insurance contract was selected and purchased by her employer, acting in the unrestrained market for health insurance, McCready would have suffered the same "loss"—boycott or no boycott—as long as her employer selected a group health insurance contract that did not cover the services of clinical psychologists. Thus, McCready's "loss" was caused by her employer's independent purchasing decision, not by a reduction of competition brought about by the alleged boycott.

(2) *The terms of coverage in the Plans' insurance contracts are exempt from the antitrust laws.* The McCarran-Ferguson Act exempts the business of insurance from the antitrust laws, except that any agreement to boycott remains subject to the Sherman Act.

McCready's complaint is essentially that her insurance coverage, which included only medically necessary services performed or supervised by a physician, violated the antitrust laws. Since the terms of the insurance contract are

the business of insurance, and since they are not a boycott, they are exempt from the antitrust laws.

The terms of coverage are the business of insurance for two reasons. First, they define the scope of the risk underwritten by the Plans. Therefore the terms of coverage are integrally connected with underwriting, which is a primary element of the business of insurance. Underwriting would be a commercial impossibility without definitions and limitations on the risks underwritten.

Second, the terms of coverage are obviously part of the contractual relationship between the Richmond Plan and McCready. The contractual relationship between insurer and insured is a commonly understood aspect of the business of insurance.

Furthermore, the terms of coverage are not a boycott. The Richmond Plan and the Roanoke Plan by statute are not competitors. A boycott requires an agreement between at least two competitors not to deal with a third party. Also, even if the Plans are (erroneously) characterized as horizontal combinations of physicians, some of whom compete with clinical psychologists, the terms of coverage are still not a boycott, because the terms are ancillary to legitimate economic integration by the physicians. Only a "naked" refusal to deal, which is not ancillary to legitimate economic integration, can be properly characterized as a boycott within the meaning of the McCarran-Ferguson Act.

ARGUMENT

(A) McCready's Complaint Must Be Dismissed Because She Lacks Standing Under § 4 Of The Clayton Act

The first question presented by this case is whether McCready, who is not a clinical psychologist, has standing under § 4 of the Clayton Act to complain that the Plans and NSV conspired "to exclude and boycott clinical psychologists from receiving compensation under prepaid

health care plans."[29] The answer to this question must be no. McCready lacks standing because her "injury" (the lack of reimbursement under her insurance contract) is unrelated to any reduction in competition in the market for health insurance and therefore is not antitrust injury.

(1) *The Facts Of This Case Mandate The Conclusion That McCready Lacks Standing*

There are four critical facts that show McCready lacks standing under § 4:

First, McCready's complaint does not allege a restraint in the health insurance market. As the district court noted, "[t]here is no suggestion that the plaintiff [McCready] cannot obtain insurance coverage for psychological treatment from insurance carriers other than the defendant providers."[30]

Second, the Plans and NSV are not in competition with one another, and indeed the Plans are prohibited from competing with each other by a Virginia statute. For this reason, no agreement between the Plans could reduce competition in the health insurance market. Nonetheless, as McCready's complaint states, the Plans do "compete with various health insurance companies and other business concerns . . . which also provide prepaid health care and health insurance plans to consumers."[31]

Third, McCready's health insurance contract was purchased by her employer, which made an independent purchasing decision in an unrestrained market. McCready's employer could have elected to buy a more expensive group insurance contract that covered services of clinical psychologists. Her employer did not do so. Thus, McCready's

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[29] McCready complaint ¶ 25; J.A. 55.

[30] J.A. 18.

[31] McCready complaint ¶ 18; J.A. 52.

"injury" (the lack of reimbursement under the insurance contract)[32] was caused by her employer's independent purchasing decision and *not* by the alleged boycott.

Fourth, the clinical psychologists who are the objects of the alleged boycott have vigorously prosecuted actions against the Plans based on the same antitrust violations alleged by McCready. The clinical psychologists, unlike McCready, have standing under § 4 because their "injury" (the alleged loss of patients to psychiatrists) is the consequence of reduced competition resulting from the alleged boycott. Thus, in this case there are other plaintiffs who do have standing to vindicate the policies of the antitrust laws.

This constellation of facts, taken as a whole, mandates the conclusion in this case that McCready lacks standing under § 4.

(2) *The Law Applicable To This Case Mandates The Conclusion That McCready Lacks Standing*

This Court has never announced a definite standing rule under § 4. In *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*,[33] however, this Court made clear that recovery of punitive treble damages under § 4 must be linked to the basic policies of the antitrust laws. In *Brunswick*, a large manufacturer of automatic pinsetters and other bowling equipment acquired failing bowling alleys in the markets where the plaintiffs operated bowling alleys. Plaintiffs sued and alleged that defendant's acquisition of bowling alleys violated § 7 of the Clayton Act because of defendant's "deep pocket." These acquisitions, according to plaintiffs, preserved competitors that otherwise would have gone bankrupt.

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[32] *Id.*, ¶ 28; J.A. 56.

[33] 429 U.S. 477 (1977) (hereinafter cited as *Brunswick*).

This Court noted that to award treble damages for injury caused by the preservation of competition would be "inimical to the purposes of [the antitrust] laws."[34] For this reason, this Court held that a plaintiff must show more than a "causal link"[35] between his injury and an antitrust violation; a plaintiff must also "prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[36]

The plaintiffs in *Brunswick* had shown the necessary causal link, but they had *not* shown antitrust injury:

> If the acquisitions here were unlawful, it is because they brought a "deep pocket" parent into a market of "pygmies." *Yet respondents' injury*—the loss of income that would have accrued had the acquired centers gone bankrupt—bears no *relationship to the size of either the acquiring company or its competitors.* Respondents would have suffered the identical "loss"—but no compensable injury—had the acquired centers instead obtained refinancing or been purchased by "shallow pocket" parents. . . . Thus, respondents' injury was not of "the type that the statute was intended to forestall."[37]

A contrary holding, this Court wrote, would make antitrust recovery "fortuitous."[38]

The rule stated in *Brunswick* is necessary to confine punitive treble damage recoveries to cases that actually advance the policies of the antitrust laws. The antitrust

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[34] 429 U.S. at 488.

[35] 429 U.S. at 489.

[36] 429 U.S. at 489 (emphasis in original).

[37] 429 U.S. at 487-88, *quoting from Wyandotte Co.* v. *United States*, 389 U.S. 191, 202 (1967) (note and citations omitted; emphasis added).

[38] 429 U.S. at 487.

laws are designed to protect competition,[39] and consequently the treble damage remedy should be available only to plaintiffs whose alleged injury results from the anti-competitive effect of an antitrust violation. Any other rule would divorce the recovery of treble damages under § 4 from the fundamental purpose of the antitrust laws, which is the protection of competition.

The reasoning in *Brunswick*, applied to this case,[40] requires a holding that McCready lacks standing under § 4 because her injury is unrelated to any reduction in competition caused by the alleged boycott. McCready's "injury" is that she was not reimbursed for the cost of her treatment by a clinical psychologist, but this "injury" is the result of the terms of her insurance contract, and not the result of a reduction in competition. In addition, just as in *Brunswick*, McCready would have suffered the identical "loss"—but no compensable "injury"[41]—as long as her employer, which acted independently in an unrestrained market, continued to purchase a group insurance contract

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[39] The legislative history suggests "that Congress designed the Sherman Act as a 'consumer welfare prescription.'" *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979), *quoting from* R. Bork, *The Antitrust Paradox* 66 (1978).

[40] Some lower federal courts have suggested that *Brunswick* may be limited to its special facts. *See Lee-Moore Oil Co.* v. *Union Oil Co.*, 599 F.2d 1299, 1303-04 (4th Cir. 1979); *Engine Specialties, Inc.* v. *Bombardier Ltd.*, 605 F.2d 1, 12-15 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980). At least one court has rejected outright the argument that *Brunswick* applies only to actions under § 7. *Chrysler Corp.* v. *Fedders Corp.*, 643 F.2d 1229, 1234 (6th Cir.), *cert. denied*, 50 U.S.L.W. 3278 (Oct. 13 1981). Milton Handler has argued persuasively that *Brunswick* can be applied to actions other than under § 7. Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 Colum. L. Rev. 980, 992-95 (1977) (hereinafter cited as *Handler*).

[41] 429 U.S. at 487.

that did not cover the services of clinical psychologists. Thus, under the reasoning in *Brunswick*, McCready lacks standing.

(3) *Two Recent Decisions By This Court Illustrate McCready's Lack Of Standing Under § 4*

Reiter v. *Sonotone Corp.*[42] and *St. Paul Fire & Marine Insurance Co.* v. *Barry*[43] provide instructive contrasts to this case. In *Reiter*, a consumer alleged that she had been injured by a price-fixing conspiracy among manufacturers of hearing aids and their retail dealers.[44] This Court held that an illegal overcharge exacted from a consumer constituted injury within the meaning of § 4, even though the injury was noncommercial. The plaintiff in *Reiter* alleged injury (i.e., an illegal overcharge) that was caused by a reduction in competition in the market for hearing aids. Thus, the plaintiff in *Reiter*, unlike McCready, had standing under § 4 of the Clayton Act.

In *St. Paul*,[45] four competing insurance companies conspired to restrict the types of medical malpractice insurance available to physicians in Rhode Island. The plaintiff physicians in *St. Paul* clearly had standing under § 4 to attack this conspiracy, because their injury (the unavailability of a desirable type of insurance) was a result of the reduction in competition among the defendant insurance companies. Here, McCready makes no allegation that her choice of health insurance policies has been limited, and in fact since the Plans do not compete (unlike the

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[42] 442 U.S. 330 (1979).

[43] 438 U.S. 531 (1978).

[44] 442 U.S. at 335 n.1.

[45] The issue in *St. Paul* was whether the complaint sufficiently alleged a boycott within the meaning of § 3(b) of the McCarran-Ferguson Act, and the plaintiffs' standing was not called into question.

defendants in *St. Paul*) they could not by agreement suppress competition between themselves.

(4) *The Conclusion That McCready Lacks Standing Is Consistent With The Result in Illinois Brick Co. v. Illinois*

The denial of standing to McCready under the reasoning of *Brunswick* is consistent with the result in *Illinois Brick Co.* v. *Illinois*,[46] that an indirect purchaser could not, as a matter of law, prove that an illegal overcharge was "passed on" by an independent middleman whose pricing decisions were unrestrained. One ground for this holding was that the middleman's independent pricing decision determines whether the overcharge is passed on, and therefore an indirect purchaser is injured not by price-fixing at another level, but rather by the middleman's independent decision.

In *Illinois Brick*, this Court noted that "the question of which persons have been injured by an illegal overcharge for purposes of § 4 is *analytically distinct* from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4."[47] Although the case at bar does not involve price-fixing or an overcharge, McCready is nonetheless in essentially the situation of an indirect purchaser, because her alleged "injury" flows from the terms of coverage in the group insurance contract purchased by her employer in an unrestrained market. Just as an independent middleman in the *Illinois Brick* situation might, or might not, have passed on an illegal overcharge to an indirect purchaser,

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[46] 431 U.S. 720 (1977).

[47] 431 U.S. at 728 n.7 (emphasis added). *Cf. Handler, supra* note 40, at 1000 ("[A]s a matter of proximate cause, the prices paid by an indirect purchaser in an unrestrained and untainted market should be regarded as the result of the direct buyer's independent pricing decision rather than of the defendants' illegal actions") (note omitted).

McCready's employer might, or might not, have purchased a more expensive group contract that covered the services of clinical psychologists. Regardless of whether the standing rubric is used, neither an indirect purchaser nor McCready can recover treble damages under § 4.

(5) *The Conclusion That McCready Lacks Standing Is Also Consistent With The Target Area Rule Applied By Several Circuit Courts*

As this Court noted in *Hawaii* v. *Standard Oil Co.*,[48] "[t]he lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." The circuit courts have employed different tests to determine standing under § 4,[49] but they are in agreement that an antitrust plaintiff must allege something more than that his injury was causally related to an antitrust violation.

The most widely used standing doctrine is the target area rule, which is applied in at least the First,[50] Second,[51] and Fifth[52] Circuits. The core of the target area rule is

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[48] 405 U.S. 251, 262 n.14 (1972).

[49] *Compare, e.g., Bravman* v. *Bassett Furniture Ind., Inc.*, 552 F.2d 90, 99 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977) (standing determined on *ad hoc* case-by-case basis), *with Malamud* v. *Sinclair Oil Corp.*, 521 F.2d 1142, 1151 (6th Cir. 1975) (applying "zone of interest" test borrowed from administrative law).

[50] *Engine Specialties, Inc.* v. *Bombardier, Ltd.*, 605 F.2d 1, 17-19 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980).

[51] *E.g., Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1282 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *GAF Corp.* v. *Eastman Kodak Co.*, 519 F.Supp. 1203 (S.D.N.Y. Aug. 3, 1981).

[52] *E.g., Associated Radio Serv. Co.* v. *Page Airways, Inc.*, 624 F.2d 1342, 1362 (5th Cir. 1980), *cert. denied*, 68 L.Ed.2d 226 (1981).

a requirement that the plaintiff allege an injury that occurs in the same market as the alleged illegal restraint.[53]

For example, in *Karseal Corp.* v. *Richfield Oil Corp.*,[54] the plaintiff lacked standing because it alleged a restraint in one market (the market in which distributors sold its product), but claimed that its injury occurred in another market (the market where it sold to distributors). The landlord cases, such as *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*,[55] provide another example. The landlord lacks standing because its injury occurs in the rental market, but the alleged antitrust violation occurs in the rental market in which its tenant operates. As the court in *Calderone* noted, "we have drawn a line excluding those who have suffered economic damage by virtue of their relationships with 'targets' or with participants in an alleged antitrust conspiracy, rather than by being targets themselves."[56]

The statutory basis of the target area rule is that the phrase "by reason of" in § 4 was intended by Congress to require a showing of proximate causation in the legal sense, as well as simple causation in fact.[57] The metaphor "target area" is used to express this link between proximate causation and the market in which the injury is alleged to occur.

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[53] As the district court below noted "[McCready's] standing depends upon whether her injury was suffered within the sector of the economy competitively endangered by the defendants' alleged violation of the antitrust laws." J.A. 18.

[54] 221 F.2d 358, 362-63 (9th Cir. 1955).

[55] 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

[56] *Id.*, at 1295.

[57] In *Karseal*, the Ninth Circuit stated that: "Turning now to the cases concerning the "target area" or *proximate causation*, the rule is that one who is only *incidentally* injured by a violation of the antitrust laws, —the bystander who was hit but not aimed at, —cannot recover against the violator." 221 F.2d at 363 (emphasis in original and added).

The antitrust injury rule announced in *Brunswick* is not conceptually distinct from the target area rule, in that either rule, properly applied, will give the same result in every case.[58] The antitrust injury rule has two advantages over the target area rule: first, the antitrust injury rule is explicitly linked to the *purposes* of the antitrust laws, while the target area rule is not. Second, the antitrust injury rule is expressed functionally, in contrast to the metaphorical target area rule.

Against this background, the error committed by the Fourth Circuit below is clear. The Fourth Circuit purported to find that McCready's injury was "proximately" caused by the alleged boycott. Under the target area rule, this is incorrect, because McCready's "injury" occurred in one market, while the alleged boycott occurred in a wholly separate market, and thus McCready's injury was not proximately caused by the boycott. The antitrust injury rule requires the same result: McCready lacks standing because her injury is unrelated to any reduction in competition flowing from the alleged boycott. Under either rule, McCready lacks standing.

(6) *McCready's Complaint Is Contrary To Sound Antitrust Policy Because She Is Profiteering*

McCready, who essentially manufactured her "damages,"[59] is attempting to profiteer by means of the anti-

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[58] *Cf. Handler, supra* note 40, at 996-97 (standing and antitrust injury "disparate" doctrines that are "analytically distinct" and each should be applied separately). Mr. Handler points out that the plaintiffs in *Brunswick* clearly had *standing;* what they lacked was antitrust injury. This is correct, but there is no reverse case where a plaintiff has antitrust injury but not standing. Therefore, maintaining standing and antitrust injury as separate doctrines is redundant.

[59] In her deposition, McCready admitted that she had known that her insurance contract did not cover the services of clinical psychologists. J.A. 62 and 63. Thus, McCready deliberately manu-

trust laws. The Plans are nonprofit organizations, and a treble damage award to McCready and the class she claims to represent would ultimately be paid by the Plans' subscribers. Physicians (the alleged beneficiaries of the conspiracy) would pay nothing, and clinical psychologists (the alleged victims) would receive nothing. Instead, McCready, whose health insurance contract was purchased by her employer, would receive a treble damage windfall that would be financed by other subscribers. This is not a sensible result. For this reason, McCready lacks standing under § 4.

(B) McCready's Complaint Must Be Dismissed Because The Term Of The Health Insurance Contract That Is Challenged In Her Complaint Is Exempt From The Antitrust Laws By Virtue Of The McCarran-Ferguson Act

McCready claims that the term of her group health insurance contract limiting coverage to services performed by physicians violated the antitrust laws. This claim is invalid because this term of her health insurance contract is exempt from the antitrust laws by virtue of the McCarran-Ferguson Act. The "business of insurance" within the meaning of § 2(b) of the McCarran-Ferguson Act includes the terms of insurance contracts between insurers and insureds. Also, the term of the insurance contract at issue here was not a "boycott" within the meaning of § 3(b) of the McCarran-Ferguson Act. Hence, this term is exempt from the antitrust laws.

As noted above, the district court erroneously stated that McCready's complaint alleged a boycott and therefore the McCarran-Ferguson Act exemption did not apply. On appeal, the Plans and NSV asserted the McCarran-

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factured her damages by visiting a clinical psychologist whose services she knew were not covered. Of course, if a physician had supervised and billed for the treatment of McCready by a clinical psychologist, the services would have been paid for by the Richmond Plan.

Ferguson exemption as an alternative ground for affirming the district court's dismissal of McCready's complaint,[60] but the Fourth Circuit did not rule on this issue. Since this is a question of law that turns on interpretation of a federal statute, this Court may properly decide this issue without a remand to the Fourth Circuit.[61]

(1) *The Term Of The Insurance Contract Challenged By McCready Is The Business Of Insurance Within The Meaning Of The McCarran-Ferguson Act*

(a) *McCready's Complaint Challenges a Term of Her Health Insurance Contract*

The group health insurance contract (or "plan") purchased for McCready by her employer by its terms covered only medically necessary services performed by a physician.[62] It is this term of coverage in her health insurance contract that is the basis of McCready's complaint:

> [McCready] brings this action . . . on behalf of all . . . subscribers who have incurred costs for psychological services rendered by clinical psychologists . . . but who have not been reimbursed for such costs under applicable prepaid health care plans administered by defendants. For purposes of this Complaint an "ap-

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[60] Brief for Appellees, 32-34.

[61] This Court has held that a remand is unnecessary where an issue was fully briefed and argued below and where the issue turns on interpretation of a federal statute. *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568 (1979); *Board of Curators, Univ. of Missouri* v. *Horowitz*, 435 U.S. 78 (1978); *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471 (1977); *Danridge* v. *Williams*, 397 U.S. 471 (1970).

[62] J.A. 66. Judge Widener pointed out in his dissent below that:

> Physicians are recognized, certainly by the Commonwealth of Virginia, and I suppose by every State, by issuance of licenses to practice medicine, *a recognition not accorded to any other provider of medical services.*

J.A. 44 (emphasis added).

> plicable" plan *is a plan under which payments for psychological services are made when those services are rendered by a physician.*[63]

Thus, McCready's complaint rests entirely on the term of her health insurance contract that limited coverage to medically necessary treatment by physicians.

As discussed above, the Plans interpreted this term of their health insurance contracts to include the services of clinical psychologists where the physician supervision requirement was satisfied. As the Fourth Circuit explained:

> The county provided its employees group coverage purchased from Blue Shield of Virginia. That group plan *provided for reimbursement to subscribers for treatment by psychiatrists, or by psychologists whose services were supervised and billed by a treating physician.*[64]

This interpretation of the insurance contracts by the Plans expanded the coverage afforded subscribers, including McCready.

(b) *The Term of the Health Insurance Contract Challenged By McCready Falls Squarely Within the "Business of Insurance" Under* Royal Drug

In *Group Life & Health Insurance Co.* v. *Royal Drug Co.*,[65] this Court held that "provider contracts" between pharmacies and a Blue Shield plan did not fall within the "business of insurance" for purposes of the McCarran-

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[63] McCready complaint ¶ 10; J.A. 50 (emphasis added). Paragraphs 3 and 28 of the complaint contain similar allegations. J.A. 48 and 56.

[64] J.A. 28 (emphasis added).

[65] 440 U.S. 205 (1979). *See* Note, *The Definition of the "Business of Insurance" Under the McCarran-Ferguson Act After Royal Drug*, 80 Colum. L. Rev. 1475 (1980).

Ferguson Act. Under the provider contracts at issue in *Royal Drug*, a pharmacy would provide prescription drugs to Blue Shield subscribers for a nominal charge, and Blue Shield would reimburse the pharmacy for the wholesale cost of the drugs. Subscribers could obtain drugs for the nominal charge only at a pharmacy that was party to a provider contract. Plaintiffs, who were pharmacies not parties to provider contracts, alleged that the provider contracts violated § 1 of the Sherman Act.

This Court found that the provider contracts were outside the business of insurance for two reasons. First, the provider contracts did not involve the underwriting and spreading of risks, which is a "primary" element of the business of insurance.[66] Second, the provider contracts did not form any part of the contractual relationship between Blue Shield and its subscribers, which is "[a]nother commonly understood aspect of the business of insurance."[67] Instead, the provider contracts were only cost-saving devices not integrally connected with insurance.[68]

Most significantly, this Court went on to note:

> This is not to say that the contracts offered by Blue Shield to its policyholders, as distinguished from its provider agreements with participating pharmacies, may not be the business of insurance within the meaning of the [McCarran-Ferguson] Act.[69]

Thus, the question presented by this case—whether a term of the insurance contract between McCready and the Richmond Plan is the business of insurance—was not decided by this Court in *Royal Drug*. Nonetheless, this Court's reasoning in *Royal Drug*, applied to this case, mandates a

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[66] 440 U.S. at 211.

[67] 440 U.S. at 215.

[68] 440 U.S. at 213-214.

[69] 440 U.S. at 230 n. 37.

holding that the term of the insurance contract at issue here is the business of insurance.

McCready's complaint is grounded on the term of her health insurance contract with the Richmond Plan that covered medically necessary services performed or prescribed by a physician. This term had one simple function: it defined the risks that the Richmond Plan agreed to underwrite in exchange for a specified premium. Underwriting would be impossible without an agreement as to which risks are underwritten and which are not. Indeed, McCready's real grievance is simply that the Richmond Plan did not agree in the insurance contract to underwrite a risk McCready thinks should be underwritten. McCready is essentially asking the federal courts to change by judicial fiat the nature of the risk assumed by her insurance carrier. The term of coverage at issue in this case is similar to a term in a fire insurance contract requiring a sprinkler system in an insured building: both terms limit the risk of loss assumed by the insurance company.[70]

The second reason this Court found the provider contracts in *Royal Drug* to be ouside the business of insurance was that they were not part of the insurance contract.[71] The contract between insured and insurer is a "commonly understood aspect of the business of insurance,"[72] which includes as well matters affecting the "reliability, interpretation and enforcement" of the insurance contract between insurer and insured.[73] The term

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[70] R. Memr & E. Cammack, *Principles of Insurance* 30-32 (6th ed. 1976) (definition of "risk"); *see* American Academy of Actuaries, Statement 1980-7, 6 *J. of American Actuaries* 85-86 (1980) (purposes of risk classification).

[71] 440 U.S. at 215-217. *See Klamath Lake Pharmaceutical Ass'n* v. *Klamath Medical Serv. Bureau*, 507 F.Supp. 980 (D.Ore. 1981).

[72] 440 U.S. at 215.

[73] 440 U.S. at 216. This Court cited *SEC* v. *National Sec. Inc.*, 393 U.S. 453, 460 (1969) (business of insurance includes "[t]he

of the health insurance contract at issue here (in contrast to the provider contracts in *Royal Drug*) is obviously a part of the contract between insured and insurer and thus within the business of insurance. Furthermore, the physician supervision requirement also falls within the business of insurance because this requirement interpreted the insurance contract in a way that directly affected its enforcement. The physician supervision requirement allowed Blue Shield subscribers to be reimbursed for treatment by psychologists, while making certain that a medical judgment was always made that such treatment was medically necessary.

Thus, the term of the health insurance contracts at issue here is within the business of insurance under *Royal Drug*, because this term is inseparable from underwriting and also because it was an integral part of the contractual relationship between the Richmond Plan and McCready.

(c) *Two Lower Court Decisions Following* Royal Drug *Strongly Support the Conclusion that the Term of the Health Insurance Contract at Issue Here Is Within the Business of Insurance*

Since this Court's decision in *Royal Drug*, two federal courts have issued decisions that strongly support the conclusion that the term of the insurance contract at issue here is business of insurance: *Hahn* v. *Oregon Physicians Service*,[74] and *Proctor* v. *State Farm Mutual Automobile*

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relationship between insurer and insured, the type of policy which could be issued, [and the] reliability, interpretation, and enforcement" of the insurance policy). *See SEC* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65, 71-73 (1959) (issuance of variable annuities not within business of insurance because insurer accepts no investment risk that its portfolio will fall in value).

[74] 508 F. Supp. 970 (D.Ore. 1981), *appeal docketed*, No. 81-3173 (9th Cir. Mar. 26, 1981).

Insurance Co.[75] In each of these cases the court applied the principles set out in *Royal Drug* and held that the defendants' actions were within the business of insurance.

Hahn v. *Oregon Physicians Service* involved facts parallel to those alleged by McCready. Plaintiffs in *Hahn* were podiatrists, and defendants were providers of health insurance. Treatment by a podiatrist was covered by defendants' insurance contracts only when a subscriber was referred to the podiatrist by a physician. The court, relying on *Royal Drug*, held this limitation on coverage was the business of insurance.[76] The court first noted that *Royal Drug* did not involve the insurance contract between insurer and insured, while the limitation on treatment by podiatrists in the case before it was part of the insurance contract. The court next pointed out that:

> [T]he *Royal Drug* agreements did not spread or underwrite the risk of providing coverage for prescription drugs; they merely lowered the cost of providing the coverage. *Here, the alleged restraints are an integral part of the risk of covering care to the foot.*
>
> *The risk assumed by defendants, as underwriters of medical care to the foot, is affected by their determination that their risk would be greater if podiatrists were permitted to treat their insureds equally with M.D.'s.*[77]

Just as in *Hahn*, the risk assumed by the Plans here would have been greater if clinical psychologists were permitted to treat their insureds equally with M.D.'s. Thus, the limitation on coverage attacked by McCready is part of underwriting a risk and is therefore the business of insurance.

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[75] 1980-81 Trade Cas. (CCH) ¶ 63,591 (D.D.C. 1980), *appeal docketed*, No. 80-2437 (D.C.Cir. Nov. 14, 1980).

[76] 508 F. Supp. 970 (D.Ore. 1981), *appeal docketed*, No. 81-3173 (9th Cir. Mar. 26, 1981).

[77] 508 F. Supp. at 973-75 (emphasis added).

In *Proctor*, plaintiffs alleged that the defendant automobile insurance companies used in concert a formula for determining the amount the companies would pay for repairs to damaged automobiles, and that this violated § 1 of the Sherman Act.[78] The district court and the District of Columbia Circuit both held that the use of a common formula was within the business of insurance.[79] This Court remanded for further consideration in light of *Royal Drug*.[80] On remand, the district court again held that the formula was the business of insurance, on the ground that "[s]uch horizontal conduct among insurers is clearly the 'business of insurance' under the *Royal Drug* rationale."[81] *Royal Drug*, the district court emphasized, involved agreements with pharmacies that did not directly affect policyholders or the contractual relationship between the policyholders and their insurance companies. The reasoning of the district court in *Proctor* supports the conclusion that the term of coverage in the insurance contract challenged by McCready is the business of insurance.

(d) *The Fourth Circuit's Decision in* VACP *Is Contrary to* Royal Drug *and Should Be Disregarded*

One lower court decision is clearly contrary to *Royal Drug:* in *VACP*, the Fourth Circuit found that the term of coverage in the Plans' insurance contracts was not the business of insurance.[82]

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[78] 1980-81 Trade Cas. (CCH) ¶ 63,591, at 77,139 (D.D.C. 1981), *appeal docketed*, No. 80-2437 (D.C.Cir. Nov. 14, 1980).

[79] 561 F.2d 262 (1977), *remanded*, 440 U.S. 942 (1979).

[80] 440 U.S. 942 (1979).

[81] 1980-81 Trade Cas. (CCH) ¶ 63,591, at 77,139-40.

[82] 624 F.2d 476 (4th Cir. 1980), *cert. denied*, 101 S.Ct. 1360 (1981). *See* Comment, *The Scope of the "Business of Insurance" Provision of the McCarran-Ferguson Act: Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia*, 65 Minn. L. Rev. 1187 (July 1981).

The opinion in *VACP* is hopelessly confused. The Fourth Circuit asserted that the coverage of the Plans' insurance contracts did not involve underwriting, because underwriting reaches only the decision to cover a certain disease or disorder.[83] Since the Plans' insurance contracts covered nervous disorders, the Fourth Circuit concluded that the term of the insurance contracts that limited coverage to medically necessary treatment of nervous disorders by physicians did not affect the risk assumed by the Plans, and hence did not involve underwriting.

This reasoning is patently flawed. A limitation to medically necessary treatment by a physician obviously limits the risk accepted by the Plans. Under the Fourth Circuit's view of the matter, the Plans would have not underwritten any greater risk had they agreed to pay for any treatment, necessary or not, of a nervous disorder by *any* provider, including naturopaths, faith healers and witch doctors.

The fact is that psychotherapy performed by an unsupervised clinical psychologist may well be useful but not medically necessary. Covering the services of unsupervised clinical psychologists expands the risk accepted by the Plans because clinical psychologists are not trained or licensed to make the medical judgment that psychotherapy is, or is not, medically necessary. The inevitable result is that the express coverage of only medically necessary services becomes unenforceable.

Since the coverage of medically necessary treatment by physicians limited the risks accepted by the Plans, this limitation involved underwriting and was the business of insurance under *Royal Drug*.[84]

In addition, the Fourth Circuit in *VACP* simply ignored the second branch of *Royal Drug*, where this Court noted

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[83] 624 F.2d at 484.

[84] *Hahn* v. *Oregon Physicians Serv.*, 508 F.Supp. 970, 974 (D. Ore. 1981), *appeal docketed*, No. 81-3173 (9th Cir. Mar. 26, 1981).

that the contractual relationship between insurer and insured was the business of insurance.[85] The limitation on coverage at stake in *VACP* (as well as here) was part of the insurance contracts between the Plans and their subscribers and therefore was the business of insurance.

For these reasons, the decision in *VACP* that the limitation on coverage is not the business of insurance is wrong and should be rejected.

(e) *This Case Does Not Involve a Peer Review System and Is Distinguishable from* Pireno, *Which Is on Certiorari to This Court*

In *Pireno* v. *New York State Chiropractic Association*,[86] the Second Circuit held that a peer review system used by health insurers to determine the usual and customary fees for services covered by their contracts was not the business of insurance. Since the peer review system was not part of the insurance contract between the insurer and the insured (unlike the term of coverage at issue here), the decision in *Pireno* does not reach this case.

Nonetheless, it is significant that the court in *Pireno* implied that the term of coverage included in the contract would be the business of insurance, because this term determined the scope of the risk transferred.[87] That is precisely this case, and therefore *Pireno* by implication supports the conclusion that the term of the contract at issue here is the business of insurance.

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[85] *Group Health & Life Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 211 (1979).

[86] 650 F.2d 387 (2d Cir. 1981), *cert. granted*, 50 U.S.L.W. 395 (Nov. 17, 1981).

[87] 650 F.2d at 393 ("The risk that an insured will require chiropractic treatment has been transferred from the insured to the insurer by the very purchase of insurance").

(2) *McCready Does Not And Indeed Cannot Allege A "Boycott" Within The Meaning Of § 3(b) Of The McCarran-Ferguson Act*

Section 3(b) of the McCarran-Ferguson Act provides that "[n]othing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate." The term of coverage in the insurance contract at stake here does not constitute a "boycott" within the meaning of § 3(b), and consequently the exception in § 3(b) does not apply to this term. Since this term of coverage is the business of insurance, as shown above, it is exempt from the antitrust laws by virtue of the McCarran-Ferguson Act.

There are two reasons this term of coverage cannot be categorized as a boycott. First, the Plans are prohibited by a Virginia statute from competing with one another.[88] For this reason, the term of coverage, even if the result of an agreement between the Plans, cannot be a boycott, because the term "boycott" refers only to concerted refusals to deal *by competitors*. Second, this term is not a boycott even if the Plans are characterized as horizontal combinations of physicians,[89] because the limitation on coverage is ancillary to a legitimate joint economic enterprise—the operation of the Plans. Only "naked" concerted refusals to deal fall within the boycott exception in § 3(b) of the McCarran-Ferguson Act.

The district court, relying solely on *Ballard* v. *Blue Shield of Southern West Virginia, Inc.*,[90] incorrectly stated that the limitation on coverage constituted a boycott within the meaning of § 3(b). The decision in *Ballard* is

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[88] Va. Code § 38.1-822.1 (contained in appendix to this brief).

[89] The Fourth Circuit in *VACP* mistakenly characterized the Richmond Plan in this fashion. 624 F.2d at 479-81.

[90] 543 F.2d 1075 (4th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977).

inapposite, and the holding of the district court against the Plans on this issue is entitled to no weight.

Before the Fourth Circuit, the Plans argued vigorously that the McCarran-Ferguson exemption was an alternative ground for affirming the district court's dismissal of McCready's complaint.[91] The Fourth Circuit, as discussed earlier, passed over this issue. Nonetheless, this Court is free to review the district court's erroneous holding and to find that the limitation on coverage is not a boycott within the meaning of § 3(b).[92]

(a) *The Term of Coverage Is Not a "Boycott" Within the Meaning of § 3(b), Because the Plans Are Not Competitors*

The SCC exercises extensive and specific statutory authority over the operations of the Plans, and in particular, pursuant to statute, the SCC assigns each Plan a specific geographic area. The relevant Virginia statute provides as follows:

> Subscription contracts *shall not be sold to persons residing outside the area of the Plan unless they are regularly employed within the area.* The subscription contract of a subscriber who neither lives nor is employed within the area shall be cancelled by notice given in accordance with the terms of the subscription contract.[93]

The Richmond and Roanoke Plans operate in separate geographic areas of Virginia, and the SCC has not licensed another plan to operate in either of their geographical areas. Therefore, the Richmond and Roanoke Plans are forbidden by statute from competing with one another.

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[91] Brief for Appellees, 23-24.

[92] *See* cases cited at *supra* note 61.

[93] Va. Code § 38.1-822.1 (emphasis added) (contained in Appendix to this brief).

Nonetheless, as McCready's complaint alleges:

> *The Blue Shield defendants* [i.e., the Plans] *compete with various health insurance companies and other business concerns* . . . which also provide pre-paid health care and health insurance plans to consumers of medical services, including the services of clinical psychologists.[94]

Thus, although the Plans do not compete with one another, they do directly compete with the commercial health insurance companies operating in Virginia. The complaint contains no allegation that the Plans have combined or agreed in any way with the commercial health insurance companies with which the Plans compete.

The term of coverage at issue in this case has no anticompetitive purpose or effect. Indeed, because the Plans do not compete, no agreement between the Plans could have the effect of suppressing competition in the market for health care insurance.[95]

Furthermore, the physician supervision requirement expanded the coverage of the Plans' insurance contracts, promoted efficiency and therefore had a legitimate economic justification. The purpose of this requirement was to make certain that the Plans paid only for psychotherapy by clinical psychologists that was medically necessary, and therefore covered by the Plans' health insurance contracts.[96]

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[94] McCready complaint ¶ 18; J.A. 52 (emphasis added).

[95] *Cf.* R. Posner, *Antitrust Law: An Economic Perspective* 208 (1976) ("A boycott is a proper object of concern under the antitrust laws, it seems to me, when, and only when, it is used to enforce an anticompetitive practice").

[96] Presumably the only alternative to the physician supervision requirement would have been a *post hoc* medical judgment made after the clinical psychologist's bill was submitted for reimburse-

The leading decision of this Court on the meaning of "boycott" under § 3(b) of the McCarran-Ferguson Act is *St. Paul Fire Marine Insurance Co.* v. *Barry*.[97] There this Court held that an agreement by the four insurance carriers who offered malpractice coverage to doctors in Rhode Island constituted a boycott within the meaning of § 3(b). In *St. Paul*, which came to this Court on a motion to dismiss, the complaint alleged that the four defendants were the *only* sellers of medical malpractice insurance in Rhode Island, and that the largest of the defendants had refused to write malpractice coverage on an "occurrence" basis. (An "occurrence" policy covered acts or omissions occurring while the policy is in effect, regardless of when the claim was made.) This defendant would write malpractice coverage only on a "claims" basis, which covered only claims made during the term of the policy. In furtherance of the alleged conspiracy, the remaining three defendants refused to deal with the policyholders of the largest defendant, with the result that those policyholders could obtain only less desirable "claims" coverage.

This Court held that the complaint alleged a boycott within the meaning of § 3(b) of the McCarran-Ferguson Act, and therefore the alleged agreement was not exempt from the Sherman Act. The term "boycott," as used in § 3(b), according to this Court, was intended by Congress to carry the same meaning that it has in the context of the Sherman Act. This Court quoted with approval from *FMC* v. *Svenska America Linien*,[98] that "[u]nder the Sherman Act, any agreement by a group of *competitors* to boycott a particular buyer or group of buyers is illegal

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ment. Under this alternative, the subscriber could not have known in advance whether a clinical psychologist's treatment would be covered or not.

[97] 438 U.S. 531 (1978).

[98] 390 U.S. 238, 250 (1968) (emphasis added).

per se." This holding reversed decisions of the Fifth Circuit and the Ninth Circuit, which had construed the term "boycott" as used in § 3(b) to reach only concerted refusals to deal with insurance companies or insurance agents by other insurance companies or agents.[99]

In light of this Court's decision in *St. Paul*, the issue presented here is whether McCready's complaint sufficiently alleges a "boycott" as that term is used in the context of the Sherman Act. The answer to this question is no, because the Plans, unlike the insurance company defendants in *St. Paul*, are not competitors. A boycott requires an agreement among competitors.

A comparison of the agreement alleged in *St. Paul* with the agreement alleged by McCready shows why this must be true. The agreement alleged in *St. Paul* would have the inevitable effect of suppressing competition in the malpractice insurance market in Rhode Island. Yet since the insurance companies that were parties to this agreement had not integrated their operations (exept to the extent of jointly agreeing to the boycott), no economic efficiencies could result from the agreement.[100] In contrast, the agreement between the Richmond Plan and the Roanoke Plan alleged in McCready's complaint could *not* have the effect of suppressing competition in the health insurance market because the Plans are not in competition with one another (although as McCready alleges in her complaint, the Plans *are* in competition with commercial health insurance companies).

The Plans and NSV know of no case where a horizontal agreement between non-competitors (such as the Richmond and Roanoke Plans) has been characterized as a boycott within the meaning of either § 1 of the Sherman Act or

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[99] *See* 438 U.S. at 536 n. 5.

[100] R. Bork, *The Antitrust Paradox: A Policy At War With Itself* 334-38 (1978).

§ 3(b) of the McCarran-Ferguson Act. In addition, a number of cases establish that Blue Shield plans and commercial insurance companies are *not* required to deal with all competing providers of health care, and, either expressly or by implication, establish that limiting coverage to certain providers does not constitute a boycott within § 3(b).[101]

In holding that McCready had sufficiently alleged a "boycott," the district court relied exclusively on *Ballard* v. *Blue Shield of Southern West Virginia, Inc.*[102] In *Ballard*, chiropractors sued the Blue Shield Plans in West Virginia, the physician directors of the plans and the state medical association, alleging a conspiracy to boycott chiropractors by refusing to cover chiropractic treatment in the plans' health insurance contracts. The chiropractors claimed that they provided services "identical" to the services provided by medical doctors.[103] The Fourth Circuit, after a cursory discussion, held that the complaint alleged a boycott within the meaning of § 3(b).

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[101] *Nankin Hosp.* v. *Michigan Hosp. Serv.*, 361 F. Supp. 1199 (E.D.Mich. 1973) (Michigan Blue Cross Plan not required to deal with hospital that failed to meet standards for participation); *Doctors, Inc.* v. *Blue Cross of Greater Philadelphia*, 431 F. Supp. 5 (E.D.Pa. 1975), *aff'd*, 557 F.2d 1001 (3d Cir. 1976); *Frankford Hosp.* v. *Blue Cross of Greater Philadelphia*, 417 F. Supp. 1104 (E.D.Pa. 1976), *aff'd per curiam*, 554 F.2d 1253 (3d Cir.), *cert. denied*, 434 U.S. 860 (1977) (discrimination against nonparticipating hospitals does not constitute a boycott); *Anderson* v. *Medical Serv. of the District of Columbia*, 1976-1 Trade Cas. (CCH) ¶ 60,884 (E.D.Va. 1976), *aff'd per curiam*, 511 F.2d 304 (4th Cir. 1977) (favorable reimbursement to participating physicians does not constitute boycott of nonparticipating physicians); *Klamath Lake Pharmaceutical Ass'n* v. *Klamath Medical Serv. Bureau*, 507 F. Supp. 980 (D.Ore. 1981).

[102] 543 F.2d 1075 (4th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977).

[103] 543 F.2d at 1078.

Ballard cannot be applied here because the Fourth Circuit, in deciding *Ballard*, must have assumed (without discussion) that the West Virginia plans competed with one another. This assumption would be obviously false here, since the Virginia Plans are prohibited by statute from competing. The only reason boycotts are condemned by the antitrust laws is that they suppress competition.[104] Since the Plans do not compete, they cannot restrict competition between themselves by agreement.

The principle that only an agreement among competitors can be a boycott in violation of § 1 of the Sherman Act can be illustrated by a comparison of two classic antitrust decisions: *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*[105] and *Packard Motor Car Co.* v. *Webster Motor Car Co.*[106] These decisions are similar because in each case a distributor sued its former supplier or suppliers after sales to the distributor had been terminated. In *Klor's*, this Court found an illegal boycott. In *Packard*, the District of Columbia Circuit held that there had been no boycott. The only

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[104] *Gough* v. *Rossmoor Corp.*, 585 F.2d 381, 385-88 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979).

[105] 359 U.S. 207 (1959). Plaintiff Klor's was a retail dealer in appliances. Defendant Broadway-Hale also dealt in appliances. Klor's alleged that Broadway-Hale had induced several applicance manufacturers to refuse to sell to Klor's or to sell to Klor's only at discriminatory prices. This Court held that the agreement among Broadway-Hale and the appliance manufacturers was a boycott and *per se* illegal under § 1 of the Sherman Act.

[106] 243 F.2d 418 (D.C. Cir. 1957). *Packard* involved the three Packard automobile dealers in Baltimore. The largest of the three, Zell Motor Car Company, threatened to stop selling Packard cars unless it became the exclusive dealer for Packard in Baltimore. Packard agreed to not renew the contracts of the two other dealers, and as a result one of the terminated dealers sued and alleged a conspiracy to boycott plaintiff. The District of Columbia Circuit held that the agreement between Packard and Zell was not a boycott of plaintiff.

principled distinction that can be drawn between the decisions in *Klor's* and *Packard* is that in *Klor's* some of the parties to the boycott were competitors, while in *Packard* the two parties to the agreement were not competitors.[107]

For this reason, the agreement between the Plans alleged by McCready in her complaint is not a boycott within the meaning of § 3(b), because the Plans are not competitors.

(b) *Even if the Plans Are Incorrectly Characterized as Horizontal Combinations of Physicians, the Term of Coverage in the Plans' Insurance Contracts Was Not a Boycott Because It Was Ancillary to a Legitimate Joint Enterprise by the Physicians*

One court has characterized the Richmond Plan as a horizontal combination of physicians that is subject to § 1 of the Sherman Act.[108] The basis for this characterization was that a majority of the members of the Board of Directors of the Richmond Plan were physicians. Even if this characterization were correct, which it was not,[109] the limi-

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[107] *See* Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 Colum. L. Rev. 685, 712-13 (1979).

[108] *VACP*, 624 F.2d 476, 479-81 (4th Cir. 1980), *cert. denied*, 101 S.Ct. 1360 (1981). *Compare* FTC, *Enforcement Policy on Physician Agreements to Control Medical Prepayment Plans*, (BNA) Antitrust & Trade Reg. Rptr. I-1 to I-6 (Oct. 1, 1981).

[109] In reaching this erroneous result, the Fourth Circuit relied on *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967), where this Court held that a licensor that was owned and controlled by its approximately thirty licensees was a combination of the licensees within the meaning of § 1 of the Sherman Act. In *Sealy*, this Court noted that the licensees controlled the "day-to-day" business of the licensor. 388 U.S. at 353. *Sealy* is wholly inapplicable to the Plans, because the thousands of physicians who participate in the Plans exercise no real control of the Plans' affairs and are

tation on coverage still was not a boycott within the meaning of § 3(b) of the McCarran-Ferguson Act, because it was ancillary to a legitimate joint enterprise by the physicians who participate in the Plans.

Both the Richmond Plan and the Roanoke Plan are organized under a special Virginia statute authorizing "[a] group of physicians" to conduct "a plan or plans for furnishing prepaid medical . . . services."[110] As an economic matter, the Plans are integrations of the medical practices of the physicians participating in the Plans for the purpose of selling contracts for the physicians' services. In theory, a single physician could enter into contracts to provide his services in the future for a flat fee. The Plans integrate thousands of physicians in order to achieve economies of scale in marketing and administering such contracts. Because of these economies of scale, the operation of the Plans promotes consumer welfare. The Plans do not restrict the choices of health care consumers, because the participating physicians accept patients who have Blue Shield insurance, or commercial health insurance, or no insurance. Also, the Plans do not restrict consumer choices in the market for health insurance, because as the complaint alleges[111] and the district court noted,[112] the Plans

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similar in function to shareholders in a corporation. Therefore, the Plans should be treated under the black-letter rule that a corporation cannot conspire with itself. *E.g.*, *Nelson Radio & Supply Co.* v. *Motorola*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953). Cf *Dussouy* v. *Gulf Coast Inv. Corp.*, 660 F.2d 594 (5th Cir. Nov. 5, 1981) (questioning the soundness of the *Nelson Radio* rule, but noting that "[f]or purposes of federal antitrust law, a corporation cannot conspire with its officers or employees").

[110] Va. Code § 38.1-811.

[111] McCready complaint ¶ 18, J.A. 52.

[112] J.A. 18.

compete with commercial health insurance companies. Since the term of coverage in the Plans' insurance contract was ancillary to the legitimate joint economic enterprise represented by the Plans, this limitation on coverage was not a boycott.[113]

The inevitable result of characterizing the term of coverage at issue here as a "boycott" because the Plans were supposedly horizontal combinations of physicians will be to deny the Plans the right to make the routine underwriting decisions that commercial health insurance companies are free to make without fear of antitrust scrutiny. This would force the Plans to operate under a competitive handicap and, ironically, would restrict competition between the Plans and commercial health insurance companies.

CONCLUSION

McCready's complaint must be dismissed because she lacks standing under § 4 of the Clayton Act. Even if McCready has standing, however, her complaint still must be dismissed because the term of her health insurance contract challenged in her complaint is the "business of insurance" and is not a boycott and is therefore exempt from the antitrust laws by virtue of the McCarran-Ferguson Act.

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[113] *See Worthen Bank & Trust Co.* v. *National BankAmericard, Inc.*, 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974) (concerted action by competing banks to prohibit bank issuers of one credit card from dealing with issuers of a competing credit card not boycott illegal *per se* because ancillary to legitimate joint credit card enterprise); *Cullum Elect. & Mechanical, Inc.* v. *Mechanical Contractors Ass'n*, 436 F. Supp. 418, 428-30 (D.S.C. 1976).

For these reasons, the Plans and NSV pray this Court to reverse the judgment of the Fourth Circuit and to affirm the dismissal of McCready's complaint by the district court.

Respectfully submitted,

December 17, 1981

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STATUTORY APPENDIX

* * * *

The McCarran-Ferguson Act: Sections 2 and 3(b) of the McCarran-Ferguson Act, 15 U.S.C. §§ 1012(a), (b) and 1013, provide as follows:

> Sec. 2(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.
>
> * * * *
>
> Sec. 3(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

* * * *

Va. Code § 38.1-822.1 (former § 32-195.9):

> *Geographical area.* Every plan seeking to be licensed by the Commission shall specify the geographical area it desires to serve and shall satisfy the Commission that it is able to render the services of the plan.
>
> The Commission may, after notice and hearing, license more than one plan for the same geographical

area unless the Commission finds that (i) the plan's proposed method of operation or manner of doing business is not satisfactory or (ii) licensing more than one plan for the same geographical area will not promote the public welfare. If more than one plan is licensed in a geographical area, the plans in such area shall be obligated to make arrangements among themselves to see that any claim filed with the wrong plan in such area be promptly forwarded to the proper plan where the proper plan can be determined.

Subscription contracts shall not be sold to persons residing outside the area of the plan unless they are regularly employed within the area. The subscription contract of a subscriber who neither lives nor is employed within the area shall be cancelled by notice given in accordance with the terms of the subcription contract.

Respondent's Brief

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No. 81-225

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BLUE SHIELD OF VIRGINIA,
BLUE SHIELD OF SOUTHWESTERN VIRGINIA
and
NEUROPSYCHIATRIC SOCIETY OF VIRGINIA, INC.
Petitioners,

v.

CAROL MCCREADY,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether a consumer who alleges a direct financial loss of benefits under a prepaid health care plan has standing to assert an antitrust claim against defendants whose illegal boycott of competitors caused the financial loss.

2. Whether the antitrust defense of McCarran-Ferguson Act immunity may be used to justify dismissal of a complaint which charges a group boycott and coercion where the legitimacy of the defense on identical facts has already been finally adjudicated and decided adversely to the defendants in related litigation.

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Va. Code § 32-195.1:10 (1979), *recodified as* § 38.1-824 (1981) 4, 20, 41

Va. Code § 38.1-348.7 (1981) 3

MISCELLANEOUS AUTHORITIES:

Comment, 31 Vand. L. Rev. 1531 (1978) 16

W. Prosser, Handbook of the Law of Torts § 8 (4th Ed. 1971) 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-225

BLUE SHIELD OF VIRGINIA,
BLUE SHIELD OF SOUTHWESTERN VIRGINIA
and
NEUROPSYCHIATRIC SOCIETY OF VIRGINIA, INC.
Petitioners,

v.

CAROL MCCREADY,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR RESPONDENT

STATUTES INVOLVED

Section 38.1-824 (formerly codified as Section 32-195.1:10) of the Code of Virginia is set out in the Appendix to this brief.

STATEMENT OF THE CASE

A. Nature Of The Case

This case arises on a motion to dismiss plaintiff's complaint which alleges a financial loss flowing from the joint refusal of Blue Shield plans to deal with her and competing health care providers. Petitioners, defendants below, contend that such an allegation is insufficient as a matter of law to confer standing under the antitrust laws. Petitioners also seek reversal of the judgment below on the grounds that an

allegation of a group boycott in restraint of trade to plaintiff's detriment is insufficient as a matter of law to avoid the limited antitrust immunity provided under the McCarran-Ferguson Act for the business of insurance. The factual allegations of restraint of trade presented in this case have previously been established against petitioners in a related antitrust case filed contemporaneously with this case. [1]

B. Background Of Ms. McCready's Claim

From 1975 to 1978, Lillian Carol McCready was a full time employee of Prince William County, a political subdivision of the Commonwealth of Virginia. Although Ms. McCready was paid a salary during her employment, she also received, as part of her compensation package, a valuable fringe benefit, membership in a prepaid group health care plan, the cost of which was paid by her employer in consideration of her status as a full time employee.

Employee fringe benefits represent substantial economic value to employees, and for this reason have been important items of compensation in bargaining between employer and employee representatives, as this Court and other federal courts have often recognized. [2]

The fringe benefit earned by Ms. McCready here was a particularly valuable one because it provided her with economic security against crippling financial loss arising from an accidental injury or debilitating illness, by providing either direct payments to her treating health care provider or, in appropriate circumstances, cash reimbursement to replace her out-of-pocket expenses for health care treatment.

Ms. McCready's health care plan was not an insurance contract, but rather a form of guaranteed health care treatment first devised by the medical profession almost forty years ago. Thus, the Blue Shield plan which covered Ms. McCready during the time she was an

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[1] *Virginia Academy of Clinical Psychologists* v. *Blue Shield*, 624 F.2d 476 (4th Cir. 1980), *cert. denied*, ____ U.S. ____, 101 S.Ct. 1360 (1981) [hereinafter cited as "*VACP*"].

[2] *E.g.*, *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *W.W. Cross & Co., Inc.* v. *NLRB*, 174 F.2d 875 (1st Cir. 1949).

employee of Prince William County provided, among other things, a guarantee of treatment for a range of health care problems, including nervous and emotional disorders, if she elected, as she did in this case, to receive high option "major medical coverage." [3] Under this plan, Blue Shield participating physicians guaranteed Ms. McCready and her employer that the benefits provided Prince William employees would be continued throughout the contract period even if there were insufficient funds to pay her health care provider or to reimburse her, as the case might be. This distinct feature of Blue Shield plans, by which the participating physicians contract to provide medical services rather than insurance benefits, distinguishes Blue Shield plans from commercial health insurance, and in fact has been cited by Blue Shield spokesmen as a reason why the Blue Shield plans should be given special tax benefits and other preferential treatment not accorded commercial insurance companies. [4]

One additional important feature of Ms. McCready's Blue Shield plan was coverage for treatment of nervous and emotional health care problems. Coverage for treatment of nervous and emotional disorders had in fact been required by the Virginia General Assembly, which, recognizing the enormous social cost of untreated mental disease and emotional illness, had required all commercial health insurance companies and Blue Shield organizations in Virginia to include such coverage in either their insurance contracts or their prepaid health care packages. [5]

When Ms. McCready first sought recourse to the mental health care benefits provided by her Blue Shield plan, there was no apparent reason for her to believe that Blue Shield would not honor her claims. The nearby Blue Shield plan which covered the District of Columbia

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[3] Joint Appendix at 64 [hereinafter cited as "J.A."].

[4] *See, e.g., Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 229 (1979).

[5] Va. Code § 38.1-348.7 (1981); J.A. at 76.

and most of Northern Virginia, other than Prince William County, routinely paid for nervous and emotional treatment provided by independent clinical psychologists, as did the Federal Employee Program which covers hundreds of thousands of workers in the Washington Metropolitan area.[6] Moreover, for a substantial period of time, Blue Shield of Virginia had paid for the services of clinical psychologists as independent practitioners under contract terms *identical* to her contract here.[7] Finally, Ms. McCready, and indeed, Prince William County, her employer, had every reason to anticipate that Blue Shield would in fact pay for the covered services, since Virginia's "freedom of choice" legislation then in force specifically required Blue Shield organizations to make direct payments for treatment of nervous or emotional disorders by clinical psychologists.[8]

Neither Ms. McCready nor her employer was aware, however, that the Blue Shield plans, acting in concert and at the direction of their physician-dominated boards of directors, had reached an agreement as early as 1973 to stop payments for services rendered to patients by clinical psychologists, unless those services were supervised and billed through a physician.[9]

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[6] Affidavit of David H. Link , Jr., Vice President of Medical Service of the District of Columbia, in Support of Motion for Summary Judgment, October 5, 1978, in Dkt. No. 60, October 11, 1978.

[7] *VACP*, 624 F.2d at 478.

[8] Va. Code § 32-195.1:10 (1979), *recodified as* § 38.1-824 (1981). This statute was subsequently held unconstitutional by the Virginia Supreme Court for a portion of the time in question. *Blue Cross* v. *Commonwealth*, 221 Va. 349, 269 S.E.2d 827 (1980). However, during the period McCready sought reimbursement, the statute was in full force and effect and thus presumptively valid.

[9] *VACP*, 624 F.2d at 478. Interestingly enough, as the Fourth Circuit observed, the Blue Shield plans were content to have a highly qualified psychotherapist supervised by a general practitioner physician who had no training whatsoever in psychotherapy or the treatment of mental illness, so long as he met Blue Shield's definition of a "physician." *Id.* at 485. Since a

Thus, when Ms. McCready submitted her claims for reimbursement, they were, in all instances, save one, routinely denied by a Blue Shield claims processing agent who advised her that her claims could not be paid unless they were billed through a physician. [10] Although petitioners have advanced many "business" justifications for denying these claims, actually, the reason her claims were denied had nothing to do with the business of insurance, "medical necessity" or valid cost considerations, [11] but rather reflected the collective act of one group of health care providers to cut off a competitive threat or, as Blue Shield's medical director so succinctly put it, to "stop this encroachment" on doctors' privileged economic domain "once and for all." [12]

"physician" to Blue Shield includes a podiatrist, the policy ostensibly followed here could have resulted in the absurdity of a podiatrist attempting to supervise a Ph.D. psychologist in administering psychotherapy which only the clinical psychologist was qualified to provide.

[10] J.A. at 83. The denial letter sent to Ms. McCready did not disclose to her or any of the other members of the class she represents that the decision to deny her claims was in violation of state law.

[11] Throughout their statement of the case and at various other points in their brief, the petitioners persist in making unverified assertions of non-record facts which are critical to their legal arguments. To take one example, they state that the Blue Shield plans adopted the physician billing and supervision requirement "to ensure that they reimburse subscribers only for treatment by clinical psychologists that was medically necessary as required by the contracts." They also state "[t]he physician supervision requirement made certain that a medical judgment would always be made that psychotherapy was medically necessary" and that this "medical judgment could be made only by a physician." Brief for Petitioners on Certiorari at 4-5, [hereinafter cited as "Br. for Pet."]. Similar assertions appear throughout their brief (see particularly Br. for Pet., at 13-14, 21-22, 27-30, 33, 37). No citation to the Joint Appendix or the record is given for any of these assertions. But these are not facts as to which a court could take judicial notice. Rather, they are extra-record assertions of contested facts concerning business practices, motive and purpose. The danger of relying upon such assertions is illustrated by the fact that when these business reason justifications were subjected to the test of cross-examination in an adversarial context, they were largely rejected as unworthy of belief. *VACP*, 624 F.2d 476 (4th Cir. 1980).

[12] *VACP*, 624 F.2d at 485, n. 11.

McCready, a consumer, thus became an economic casualty in an intense struggle between professionals for the millions of dollars expended annually for health care treatment in Virginia. Her individual financial loss itself, by contrast, is slight. But that does not mean she has not suffered a real loss, for as the Court below found, the unreimbursed expenditures she made represent a precise financial loss, quantifiable to the last penny, directly caused by the defendants' violation of the antitrust laws. [13]

When McCready's repeated attempts to secure the reimbursement benefits she had earned as an employee were rebuffed by Blue Shield and turned away by the State Bureau of Insurance, [14] she filed this suit for antitrust damages in federal court. [15]

C. Proceedings In The District Court

In her complaint, Ms. McCready charged that the Blue Shield defendants had combined and conspired between themselves and other persons and professional associations not named as

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[13] *McCready* v. *Blue Shield*, 649 F.2d 228, 231 (4th Cir. 1981), *cert. granted*, ____ U.S. ____ , (No. 81-225, 1981 Term) [hereinafter cited as "*McCready*"].

[14] J.A. at 89.

[15] Plaintiff brought this suit as a class action on her own behalf and on behalf of all subscribers denied reimbursement benefits. Complaint, J.A. at 47. No ruling on her class action allegations has occurred, because the district court granted defendants' motion to dismiss her complaint on standing grounds. There is no reason to anticipate, however, that a class action in this case would impose any risks of unmanageability or undue burden on defendants. *Cf.*, *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 345 (1979) [hereinafter cited as "*Sonotone*"]. Blue Shield of Virginia established a reserve in 1973 in the event it had to pay subscribers' claims for psychologists' services which had been denied, and five years later, only approximately fifty such claims had been accumulated. Blue Shield of Virginia's Answers to Interrogatories, Ans. No. 6, Dkt. No. 18, filed September 14, 1978.

defendants [16] to exclude and boycott clinical psychologists from receiving compensation under prepaid health care plans in connection with the furnishing of psychological services, including psychotherapy, to subscribers to such plans [17] and that as a consequence of this conspiracy a restraint of trade:

> [P]atients have been economically coerced to receive psychological services from psychiatrists rather than clinical psychologists; and
>
> [T]he public has been denied the benefit of free and open competition between clinical psychologists and psychiatrists in the provision of psychological services to patients. [18]

She further alleged:

> Plaintiff Jane Doe and other members of the class are subscribers to applicable prepaid health care plans adopted and administered by the Blue Shield defendants. Under those plans, the Blue Shield defendants are obligated to reimburse plaintiff and other members of the class for the costs they have incurred in obtaining psychological services. In furtherance of and as a direct result of the unlawful combination and conspiracy to boycott as hereinabove alleged, the Blue Shield defendants have unlawfully refused, and continue to refuse, to reimburse plaintiffs for such costs, because psychological services were rendered to them by clinical psychologists rather than physicians. The foregoing violations by the defendants have injured plaintiff Jane Doe and the members of the class in their business and property and have caused them substantial damages, the full extent of which are not yet known. [19]

Defendants immediately moved to dismiss her case, before any substantial discovery or fact-finding could occur, on a wide variety of

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[16] J.A. 51, ¶ 15. She did not name the physician board members or other medical societies as defendants, although, of course, she could have done so. *Compare, Ballard* v. *Blue Shield of Southern West Virginia, Inc.*, 543 F.2d 1075 (4th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977).

[17] J.A. 55, ¶ 25.

[18] J.A. 56, ¶ 26.

[19] J.A. 56, ¶ 28.

grounds, including a challenge that she lacked standing to assert a claim for antitrust damages and that the anticompetitive practices she complained of were insulated from judicial scrutiny by the provisions of the McCarran-Ferguson Act. [20]

The district judge labored under two distinct disadvantages in ruling on these defensive motions. First, he did not have the benefit of the full discovery and factual development which was to occur later in *Virginia Academy of Clinical Psychologists* v. *Blue Shield ("VACP")*. [21] Second, he did not have the advantage of this Court's decision in *Reiter* v. *Sonotone Corp. ("Sonotone")*, [22] and thus relied upon the erroneous Eighth Circuit decision which this Court later reversed.

The defendants exploited this factual deficiency to its fullest advantage, portraying in the district court, as they have attempted to do here, a cleverly drawn illusion of an antitrust case set in the context of the marketing of health insurance. The district court, relying on that "insurance" illusion, dismissed McCready's complaint, reasoning that the consumer injury she suffered was not within the sector of the economy competitively endangered by the violation of the antitrust laws. [23] The court rejected the defendants' McCarran-Ferguson Act challenge in the identical *VACP* case, however, recognizing correctly that since the complaint charged a boycott, it could not be dismissed as a matter of law at this early stage of the proceeding. [24]

D. Proceedings On Appeal

By the time Ms. McCready's case reached the Court of Appeals, the illusory "health insurance market" portrayed by defendants had been overtaken by events, and more particularly, by the Fourth

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[20] 15 U.S.C. § 1012(b) (1945).

[21] 624 F.2d 476.

[22] 442 U.S. 330 (1979).

[23] J.A. at 18.

[24] J.A. at 19. Defendants have stated that the material allegations in the two complaints are identical (Br. for Pet. at 9).

Circuit's decision in *VACP*.[25] That court, with the benefit of a full record before it, recognized that the core of the antitrust violations presented in these cases had nothing to do with health insurance, but rather reflected a desire by one group of medical professionals to stifle a perceived competitive threat from another group of qualified professionals, in this case, clinical psychologists.[26]

The petitioners persist in asserting as fact that this case involves a question of insurance contract coverage for the services of clinical psychologists and that, therefore, this entire case must be analyzed from the standpoint of health care insurance. Because this factual premise is critical to their entire argument in this Court, and because it has been totally rejected by two federal appellate courts, it is essential to point out why this factual premise is erroneous.

Although defendants speak in terms of contract coverage in their brief, they admit that their restriction against payment for services of clinical psychologists is *not* a term of the Blue Shield contract, but rather "that the plans adopted these requirements as an *interpretation* of the insurance contracts."[27]

Actually, it has been established as fact that "[b]etween 1962 and 1972, Richmond plan coverage included direct payment to psychologists for psychotherapy rendered to subscribers."[28] It was not until 1972 that "this policy was revised to allow payment only when the services were billed through a physician."[29]

The contract which petitioners have included in the Joint Appendix and which they imply Prince William County purchased with knowledge that it excluded payments to clinical psychologists, is in fact a policy first issued by Blue Shield of Virginia in 1968, as shown by the code "MM-68 E-3" at page 76 of the Joint Appendix. Thus, the very contract they place in issue here was the form of contract in force

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[25] 624 F.2d 476.

[26] *Id.* at 485.

[27] Br. for Pet. at 4, n. 11.

[28] *VACP*, 624 F.2d at 478.

[29] *Id.*

during the ten year period when Blue Shield "interpreted" the contract to authorize direct payments to clinical psychologists. In short, just as the Fourth Circuit found, the decision to stop payment to clinical psychologists was *not* a question of insurance coverage. Per the court:

> In the present case, however, both Plans have been covering these mental and nervous disorders in their contracts since at least 1962. Their decision regarding psychologists was not whether to underwrite the risk of those disorders or even the need for psychotherapy; *rather it was a question of who they would pay for such services*. The coverage remained the same. [30]

Thus the *McCready* panel, relying on the factual findings established in the *VACP* case and guided by this Court's decision in *Sonotone*, concluded that McCready had suffered a direct and immediate loss under Section 4 of the Clayton Act by reason of the defendants' conspiracy against other health care professionals. [31] The court also rejected without discussion petitioners' McCarran-Ferguson arguments, apparently recognizing that since a boycott was alleged, the complaint could not be challenged on a motion to dismiss. The court also was presumably persuaded by the unanimous opinion on this issue in the companion *VACP* case which it cited with approval. [32]

After petitioners' requests for reconsideration and for a rehearing *en banc* were denied, they petitioned this Court for review. This Court granted certiorari on November 2, 1981.

SUMMARY OF ARGUMENT

Carol McCready's Complaint alleges financial injury in fact and a direct causal relationship between that injury and petitioners' acts in

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[30] *Id.* at 484 (emphasis added).

[31] *McCready*, 649 F.2d 228.

[32] *Id. at 230*. Petitioners mistakenly state the Court below did not rule on this issue. Br. for Pet. at 23. Since the issue was fully briefed and argued, it necessarily was decided, at least as to pleading sufficiency, by the reversal and remand.

restraint of trade in the delivery of health care services. She thus alleges injury to her property by reason of a violation of the antitrust laws. These allegations, which must be assumed to be true when challenged by a motion to dismiss, are sufficient to confer standing under this Court's decision in *Sonotone*, which recognized that a consumer injury can exist even where antitrust restrictions are directed at commercial competitors. Moreover, recognition of her standing is consistent with long-standing considerations of vigorous antitrust enforcement policy. Petitioners conspired to restrain competition between M.D. and non-M.D. providers of psychotherapy to Blue Shield subscribers and inflicted injury on McCready by nonpayment of health care benefits, as the means to achieve their restraint of trade. As an intended consequence of the violation, McCready was overcharged, and it would disserve basic antitrust policy to deny her redress. Nothing in the statute, legislative history, or prior decisions of this Court or lower federal courts justifies a denial of standing. Those limitations on standing which have been developed in lower courts are designed to avoid either the spectre of multiple recoveries for the same injury, or the burdens and complexities of litigating cases where alleged injury is conjectural or speculative. Neither objectionable feature is present here and McCready's case must be allowed to proceed to a hearing on the merits.

Petitioners' alternative contention that their antitrust violations are not subject to antitrust scrutiny under the State regulated "business of insurance" exemption of the McCarran-Ferguson Act is meritless. Plaintiff's complaint alleges both a "boycott" and "coercion," conduct which is expressly excluded from the protection of the Act, and thus creates issues of fact which can only be decided on the merits. In addition, these precise issues have been fully and finally determined against the Blue Shield defendants in related litigation. Finally, even on the merits, the challenged conduct is not properly subject to the antitrust exemption since the provider boycotts at issue here are not the "business of insurance" and were imposed in violation, rather than as part, of state regulation.

ARGUMENT

I. ANTITRUST VIOLATIONS AIMED AT BUSINESSES BUT WHICH ALSO RESULT IN ACTUAL FINANCIAL LOSSES TO CONSUMERS ARE ACTIONABLE UNDER SECTION 4 OF THE CLAYTON ACT UNDER THIS COURT'S DECISION IN *REITER* v. *SONOTONE CORP.* AND SOUND CONSIDERATIONS OF ANTITRUST ENFORCEMENT POLICY

The Court of Appeals concluded that McCready had standing to assert her claim for damages under the antitrust laws because the injury she alleged "was immediate and direct" and represented an actual financial loss which could be "ascertained to the penny."[33] Whether she was the intended ultimate target of the physicians' anticompetitive practices was of no legal significance to the Court of Appeals, which, guided by this Court's decision in *Sonotone*,[34] recognized that the Clayton Act, by its terms, cannot restrict standing only to "*competitors* who are *targets* of anticompetitive behavior."[35]

Upon careful analysis, it is difficult to see how the Court of Appeals could have reached a different result. As this Court emphasized in *Sonotone*, Section 4 of the Clayton Act provides redress to "any person who shall be injured . . . by reason of *anything* forbidden in the antitrust laws. . . ."[36] The Act contains "little in the way of restrictive language," but rather is "comprehensive in its terms and coverage, protecting *all* who are made victims of the forbidden practices by whomever they are perpetrated."[37]

Despite this clear language and the consistent breadth of its interpretation by this Court and other federal courts, petitioners would now have this Court rewrite the statute by engrafting limitations

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[33] *McCready*, 649 F.2d at 231.

[34] 442 U.S. at 337.

[35] *McCready*, 649 F.2d at 231 *(citing Sonotone)* (emphasis added).

[36] *Sonotone*, 442 U.S. at 337 (emphasis in original). *See also, Williams* v. *St. Joseph Hospital*, 629 F.2d 448 (7th Cir. 1980) (combination of physicians to restrict treatment of patients who brought malpractice claims constituted boycott in violation of Section 1 of the Sherman Act, for which patient had claim under Section 4 of the Clayton Act).

[37] *Sonotone*, 442 U.S. at 337-38.

(where none existed or were ever intended) in order to restrict recovery, at the pleading stage of antitrust suits, to only those individuals who were the *intended* victims of illegal practices aimed *directly* at them. Such a strained interpretation of the Act is impermissible for two fundamental reasons: First, a decision denying McCready's standing would defy the intent of Congress, would conflict with basic principles long established by this Court and would seriously undermine the enforcement objectives served by the statute. Second, it would provide a license to lower federal courts to routinely and *prematurely* terminate meritorious consumer claims before key factual allegations of injury could be even explored or established in a plenary hearing.

Since this case arises on a motion to dismiss the complaint, the complaint allegations must be taken as true and must be read in the light most favorable to respondent.[38] The petitioners' challenge to Carol McCready's standing, therefore, may only be considered according to the violation pleaded in the complaint, that is, a restraint between physicians and psychologists[39] which caused, directly and inevitably, injury to McCready's property. Viewed in this light, as detailed below, petitioners' legal challenge to McCready's complaint cannot be sustained.

A. The Facts Of The *Sonotone* Case Place It Squarely In Point And Establish McCready's Standing To Sue

Although the petitioners relied heavily on the Eighth Circuit's decision in the *Sonotone* case when it was favorable to their position,[40] they dismiss it with a single paragraph in their brief to this Court, now that the decision is unfavorable to them. According to petitioners, *Sonotone* is no longer controlling, since that case in-

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[38] *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 534 (1978); *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974).

[39] The issue cannot be properly decided by non-record references to the state of competition in the health insurance market, as petitioners appear to contend.

[40] Brief for Appellees at 19-21, *McCready*, 649 F.2d 228.

volved an illegal overcharge to a consumer caused by a reduction in competition (petitioner's euphemism for "price-fixing") in "the market for hearing aids."[41] While petitioners do not explain how this difference amounts to a legal distinction, presumably, their argument is that Reiter was an intended target of a price-fix by manufacturers, whereas McCready's injury was but a consequence of anticompetitive conduct directed against her supplier, a clinical psychologist.

Petitioners' distinction might conceivably have some basis if *Sonotone* had involved no more than a horizontal price-fix by competing hearing-aid manufacturers who sold directly to consumers. But actually, as the Court's opinion recognized, *Sonotone* involved a far more complex scheme, directed largely at the hearing aid manufacturers' *own retailers* and distributors, rather than at consumers. Specifically, Reiter alleged that the defendants had:

> [V]iolated §§ 1 and 2 of the Sherman Act . . . § 3 of the Clayton Act . . . [and had] restricted the territories, customers, and brands of hearing aids offered by their retail dealers, used the customer lists of *their retail* dealers for their own purposes, *prohibited* unauthorized retailers *from dealing in* or repairing their hearing aids, and conspired among themselves and with their retail dealers to fix the retail prices of the hearing aids.[42]

Per her complaint, the defendants' illegal practices were directed primarily at dealers and competitors in the distribution market rather than at Reiter and her fellow consumers in the retail market.

Of course, as is often the case, anticompetitive practices directed at one group, at one market level, can have a significant financial impact on others. Thus, the dealer restraints complained of in *Sonotone* led inevitably to overcharges by the targeted retailers to their own customers, as Reiter alleged.

Many group boycott schemes, repeatedly condemned by this Court, are not targeted directly at consumers, but rather at recalcitrant middlemen who wish to cut consumer prices, to the dismay of their fellow competitors, who bring economic pressure to bear on the common manufacturer/supplier.

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[41] Br. for Pet. at 17.

[42] *Sonotone*, 442 U.S. at 330, n. 1 (emphasis added).

In *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*,[43] for example, this Court condemned as a *per se* violation of the Sherman Act a vertical group boycott directed at a competing businessman who sought to compete too vigorously by discounting resale prices of electrical appliances.

Likewise, in *United States* v. *General Motors Corp.*,[44] this Court condemned a similar scheme adopted by a manufacturer and its dealer customers to punish other competing businesses who sold new cars at discount prices to consumers.

In all of these cases, the foreseeable ultimate victim was the consumer, even though the anticompetitive practices were directed at suppliers.

Here too, as in *Sonotone*, *Klor's, Inc.*, and *General Motors*, Carol McCready was an entirely foreseeable victim of anticompetitive practices directed at her supplier of health care services and necessarily at her as well. Moreover, the financial injury imposed on her was in fact a surcharge deliberately designed to steer her purchase of health care services to a favored class of health care professionals. Since that conduct is not only alleged to be illegal, but in fact has been conclusively deemed to be a restraint of trade,[45] she is just as much an antitrust victim as Kathleen Reiter and every bit as entitled, therefore, to recover her actual pecuniary losses.

B. Affirming Carol McCready's Standing Is Both Necessary And Appropriate To Effectuate The Congressional Intent Of Vigorous Enforcement Of The Federal Antitrust Laws

In enacting the treble damage provision of Section 4 of the Clayton Act, Congress intended to provide an incentive to private attorneys general to encourage vigorous enforcement of the federal antitrust

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[43] 359 U.S. 207 (1959).

[44] 384 U.S. 127 (1966).

[45] *VACP*, 624 F.2d at 484.

laws. [46] To effectuate that Congressional intent, this Court has consistently interpreted the private antitrust suit provisions broadly. [47]

In fact, following the only recent case in which this Court adopted a more restrictive interpretation of Section 4 of the Clayton Act, *Hawaii* v. *Standard Oil Co.*, [48] Congress enacted remedial legislation *broadening* the scope of private enforcement by allowing state attorneys general to bring suit for monetary damages as *parens patriae* for individual citizens. [49]

Recognizing Carol McCready's standing in this case is not only consistent with her allegation of actual monetary loss, but would also help secure effective private enforcement of the antitrust laws, since Ms. McCready, like Kathleen Reiter, is the one person most likely to seek vindication of public rights without fear of private retribution.

As noted in Part 1(A) of this argument, the actual targets of many price-fixing conspiracies and vertical boycotts are often other businessmen who have been "too competitive" to the discomfiture of their fellow competitors. [50] Unfortunately, far too often the competitor whose active price competition has earned the enmity of competitors is subject to business considerations which may deflect him from asserting a claim under the antitrust laws. Typically, this involves a fear of loss of source of supply, of credit or other form of retribution from the manufacturer/supplier who is applying the restraints. [51] In the *General Motors* case, for example, the Chevrolet dealers who were cooperating in competitive pricing arrangements with discounters almost immediately terminated the discounting practices when

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[46] *See, Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.* 429 U.S. 477, 486, n. 10 (1977); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968).

[47] *Sonotone*, 442 U.S. at 344; *Zenith Radio Corp.* v. *Hazeltine Research, Inc.* 395 U.S. 100 (1969).

[48] 405 U.S. 251 (1972).

[49] *See* 15 U.S.C. § 15(c) (1980).

[50] *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966).

[51] *See* Comment, 31 Vand. L. Rev. 1531, 1545 (1978).

confronted by General Motors management.[52] The suit challenging the restrictive practices in that case was brought by the Justice Department, not by the businessmen targets of the conspiracy.

So also in *Sonotone*, it was a consumer who brought an action against the illegal tying arrangements and vertical price-fixing schemes, not the retail dealers who were also targets as well as victims of the anticompetitive practices of the hearing aid manufacturers.

Here, too, recognizing antitrust standing for consumers such as McCready is necessary to ensure effective private enforcement of the antitrust laws.[53] The requirement of an allegation of a financial injury *in fact*,[54] coupled with proof of causation, are more than sufficient safeguards to screen out any floodtide of frivolous suits in the federal courts. But to deny standing, where those allegations have been made, as here, would serve no salutary public policy, yet would drastically limit the effectiveness of the private damage remedy as a tool of antitrust enforcement.

Equally important, a denial of standing in this case would defeat the other principal objective of the statute, recognized in *Sonotone*, to secure full payment of damages to injured parties for the wrong suffered, yet would allow the defendants to retain the financial

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[52] 384 U.S. at 135-36.

[53] It is no answer to suggest, as petitioners do, that standing for McCready is not *necessary*, since some of the targeted clinical psychologists did have the courage to bring suit. This is the exception rather than the rule, for far too often the injured competitor cannot afford to assert his claims. Moreover, petitioners' suggestion that determining standing by reference to other parties on some mutually exclusive scale has no legal support. This Court sits to announce principles of general application, and the broadest permissible interpretation of Section 4 of the Clayton Act which would encourage suit by those who can demonstrate an actual financial loss is consistent with both the legislative history, Congressional intent, and precedent, so long as there are no countervailing considerations such as duplication of damages or unfairness to defendants.

[54] *Cf.*, *Sierra Club* v. *Morton*, 405 U.S. 727 (1972).

benefits of their illegal practices. Damages in this case would be computed based on the amounts Ms. McCready has had to pay as a result of nonreimbursement by Blue Shield for the cost of psychological services Ms. McCready received. Since those amounts have all been paid by Ms. McCready to her psychologist, no other person, and particularly, no psychologists, could make a claim for recovery of these amounts. But if Ms. McCready is not permitted to recover these expenditures, petitioners would reap a windfall in the aggregate amount of Ms. McCready's unreimbursed claims. This windfall to petitioners will be multiplied by the amounts of similar claims by other subscribers which the Blue Shield defendants have denied in implementing their antitrust violations.

C. Petitioners' "Constellation of Critical Facts" Cannot Be Used To Deny McCready Standing Since Those Facts Either Do Not Exist Or Are Legally Irrelevant

Despite these compelling legal precedents and the policy considerations which encourage a broad rather than narrow interpretation of standing under Section 4 of the Clayton Act, the petitioners insist that a special "constellation" of "four critical facts" indicate that *McCready* lacks standing in this case. [55] But, as demonstrated below, two of these facts are legally irrelevant and the other two "facts" not only are not supported by any evidence in the record, but are actually contrary to the only factual findings which this Court could legitimately consider in evaluating the sufficiency of *McCready's* complaint.

The first critical fact asserted by petitioners is that McCready's complaint fails to "allege a restraint in the health insurance market." [56] Of petitioners' four critical facts, this is the only one that is accurate. No such allegation is made because none is required; indeed, such an allegation would not only be legally irrelevant, but also superfluous. McCready complains not that insurance companies combined to deny her health care coverage, but that Blue Shield plans in Virginia,

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[55] Br. for Pet. at 13-14.

[56] *Id.* at 13.

acting through their member physicians, combined to restrict her free choice of a licensed health care provider to provide the covered services. Her injury thus arises from a restraint in the market for psychological services in which she, Blue Shield, physicians and clinical psychologists are all participants.

McCready, in fact, did not even act in the health insurance market. Her health care plan was chosen by her employer. Since this plan was provided to her as an important earned benefit of her employment, she was simply not free, except at a very substantial personal cost, to seek health care coverage or treatment outside the scope of her employer's plan.

The district court, without the benefit of a full factual record which demonstrated that this artificial restriction placed on McCready's plan was a restraint of trade imposed by physicians in order to preserve their own patient base, mistakenly thought that the issue was one of insurance coverage, when in fact it was not.

Trading on this same factual misconception, the petitioners next assert inaccurately that the plans and the Neuropsychiatric Society of Virginia are not in competition with one another. [57] There is nothing in the record to support this assertion, which in fact it is obviously incorrect since the physicians who collectively comprise the Blue Shield plans do compete with each other throughout the Commonwealth of Virginia. More specifically, the psychiatrists who are members of Blue Shield plans compete among themselves and with clinical psychologists, as alleged in the complaint. [58] Petitioners' second "critical fact" thus not only misconceives the issue before the Court, but is totally inaccurate.

Petitioners' third critical set of facts is based upon the assertion that McCready's employer, Prince William County, "could have elected to buy a more expensive group insurance contract that covered

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[57] *Id.*

[58] J.A. 51, ¶ 16. There is nothing in the *Virginia Code* providing that the various Blue Shield plans in Virginia cannot compete with each other on national or federal programs, as the petitioners know they do.

services of clinical psychologists . . . [but] did not do so." [59] There is nothing in the complaint or the record alleging or establishing that the Blue Shield contract with Prince William County is an insurance contract or that Prince William County could have bought elsewhere a group insurance contract that covered services of clinical psychologists. There is nothing in the complaint, or anywhere else in the record for that matter, which establishes that such an insurance contract would have been "more expensive." There is nothing in the complaint or in the record to support the assertion that Prince William County made an "independent purchasing decision" not to buy such a contract. This last extra-record assertion is particularly inappropriate since, as a county government and political subdivision of the Commonwealth of Virginia, Prince William County had every reason to expect and believe that an association of physicians like Blue Shield would obey state law, then in force, which made it illegal for the Blue Shield plans to refuse to pay, directly or indirectly, for the services of clinical psychologists. [60]

The Blue Shield defendants attempted to make this factually unsupportable argument in the Court of Appeals in the related *VACP* case, and it was categorically rejected. As that Court found, clinical psychologists were paid for over ten years under the basic Blue Shield major medical contract, and it was not until 1972 that Blue Shield adopted an *internal* policy of not paying for the services of clinical psychologists. The basic contract remained the same and has always provided coverage for treatment of nervous and emotional disorders. [61]

Finally, the petitioners assert that clinical psychologists, who are the objects of their boycott, have vigorously prosecuted actions against Blue Shield "based on the same" antitrust violations alleged by McCready. [62] While this factual assertion is basically true, it does

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[59] Br. for Pet. at 13.

[60] *See, generally, Va. Code* § 38.1-824 (1981); *Blue Cross* v. *Commonwealth*, 221 Va. 349, 269 S.E.2d 827 (1980).

[61] *VACP*, 624 F.2d at 478, 483-84.

[62] Br. for Pet. at 14. While Respondents and the psychologists complain of the same antitrust violation, they assert separate and distinct claims for relief under Section 4 of the Clayton Act. 15 U.S.C. § 15 (1914). Unless both have standing, there will be no way to assure complete recovery.

not, as petitioners suggest, diminish the independent standing of McCready to recover her own separate and non-duplicative financial damages arising from the same antitrust violations. Petitioners seem to imply that only one category of persons can be injured by an antitrust violation, but that surely is not the case. Tie-in arrangements, for instance, injure *competitors* as to the tied product, who can sue under Section 4 for their injuries. [63] They likewise injure *purchasers* of the tied product, who also are familiar tie-in plaintiffs. [64] The analogy to this case is clear since psychologists are the competitors and their patients are the purchasers. Similarly, in a major "target area" case, where a manufacturer of automobile polish sued another manufacturer which had entered into agreements with its distributors that they would not deal with the plaintiff, the court noted that *both* the manufacturer and the distributor would be within the target area of the violation and suitable plaintiffs. [65]

In short, the only "critical facts" which have actually been established and which might appropriately be considered by this Court outside of the record are the findings in the companion *VACP* case, which demonstrate that the Blue Shield plans acted not as insurance companies but rather as associations of professionals who imposed an illegal restraint of trade by denying consumers their free choice of mental health care providers. [66]

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[63] *E.g., Advanced Business Systems and Supply Co.*, v. *SCM Corp.*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

[64] *E.g., Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969).

[65] *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358, 364 (9th Cir. 1955).

[66] *VACP*, 624 F.2d at 481. *Cf., National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975).

D. Recognition Of McCready's Standing Is Not Inconsistent With The *Illinois Brick* Decision Because, As The Court Of Appeals Correctly Recognized, There Can Be No Duplication Of Damages And Ms. McCready Is Not An Indirect Purchaser Within The Meaning Of That Case

Apparently recognizing that the existence of a real financial loss to McCready cannot be denied, the petitioners insist that this loss nevertheless cannot be compensated because McCready is an indirect purchaser within the meaning of the *Illinois Brick* decision.[67] According to petitioners:

> *McCready* is . . . in essentially the situation of an indirect purchaser, because her alleged "injury" flows from the terms of coverage in the group insurance contract purchased by her employer in an unrestrained market.[68]

Apart from its fallacious factual predicate (see Part I (C), *supra*), this contention not only misconstrues *Illinois Brick*, but as will be shown below, it also misstates the *McCready* complaint.

First, the Blue Shield contracts did *not* fail to cover psychologists' services. In fact, Blue Shield paid for identical services when billed through a physician. The restraint imposed was on her choice of a provider — not on the type of health care provided.

Further, however, *Illinois Brick* was not based upon concerns about causality or whether or not injury was caused by the violation or by a middleman's pricing decision. To the contrary, the Court's decision reflects the conviction that Section 4 should be construed to encourage private actions and to permit *complete, but not duplicative*, recoveries. In *Illinois Brick*, the Court reaffirmed its ruling in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*,[69] that defendants could not assert the pass-on defense and held that plaintiffs

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[67] *Illinois Brick* v. *Illinois*, 431 U.S. 720 (1977) [hereinafter cited as "*Illinois Brick*"].

[68] Br. for Pet. at 18. Petitioners ignore the fact that the *Illinois Brick* case is not even a standing case. 431 U.S. at 728, n.7.

[69] 392 U.S. 481 (1968).

similarly could not show that injuries to their supplier were passed on to them. Referring to *Hanover*, the Court stated:

> Rather, we understood Hanover Shoe as resting on the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge *in the direct purchasers* rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it. [70]

The Court's decision — to permit only direct purchasers to sue for price fixing — was designed to avoid the complex task of apportioning recovery among all potential plaintiffs. In addition, the Court recognized that Section 4 would lose its remedial force if recoveries had to be divided between all those who suffered some portion of the injury. The Court concluded:

> We think the longstanding policy of encouraging vigorous private enforcement of the antitrust laws *** supports our adherence to the *Hanover Shoe* rule under which direct purchasers are not only spared the burden of litigating the intricacies of pass on but also are permitted to recover the full amount of the overcharge. [71]

On these same principles, McCready should also recover the full amount of the surcharge she was forced to bear. She dealt directly with her plan, which denied her claim for reimbursement as a result of the conspiracy. She dealt directly with a psychologist, also a victim of the conspiracy. That psychologist may have a claim for damages as to *other* patients who were coerced into seeking treatment by psychiatrists, but he has *no claim* for his treatment of McCready. There is no duplication here, no passing on and no complex task of apportion-

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[70] *Illinois Brick*, 431 U.S. at 734-35.

[71] *Id.* at 745-46.

ment. [72] Each potential plaintiff suffered the full amount of a different injury, and as the Court of Appeals concluded:

> There can be no double recovery. She has already paid her psychologists' bills; the psychologist suffered no damage in this respect. Although McCready is a consumer and not a competitor, her allegations of direct pecuniary loss by reason of antitrust violations are sufficient to confer standing. [73]

E. Petitioners' Confused Analysis Of The "Target Area" And "Antitrust Injury" Tests Provides No Basis For Denying Carol McCready's Standing

In a final effort to justify their insistence that McCready's complaint be dismissed, the petitioners insist she lacks standing under the "target area" doctrine or, alternatively, because she has not suffered an "antitrust injury." [74] Neither contention is correct, however, for the Court of Appeals relied upon a classic target area case and correctly applied it to the facts of this case. Moreover, the surcharge defendants

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[72] Similar arguments advanced by petitioners here have been rejected by other courts. *See, e.g., Pollock* v. *Citrus Associates of the New York Cotton Exchange, Inc.*, 512 F.Supp. 711 (S.D. N.Y. 1981), where the district court rejected application of the *Illinois Brick* rule, and found a " 'legally significant causal relationship between the [defendants'] alleged violation and the [plaintiffs'] alleged injury,' " which was sufficient to bring the plaintiffs well within the "target area" of defendants' alleged anticompetitive behavior. *Id.* at 719; and *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co., Ltd.*, 494 F.Supp. 1161, 1250-51 (E.D. Pa. 1980), where the district court held *Illinois Brick* inapplicable because plaintiff's damages did not depend on proof that overcharges were passed on to it by other persons in the chain of distribution of its products. The court in *Zenith* followed earlier Supreme Court decisions which permitted recovery of antitrust damages by a manufacturer against a competing manufacturer without reference to the method of distribution. *Id.* at 1251 (see cases cited therein).

[73] *McCready*, 649 F.2d at 232.

[74] Petitioners cite Milton Handler's article for the proposition that standing and antitrust injury are "analytically distinct." Br. for Pet. at 21, n. 58. However, petitioners then state that the rules are not conceptually distinct in that "either rule, properly applied, will give the same result in every case." Br. for Pet. at 21.

caused McCready to suffer when she used a competing health care provider, is clearly a financial injury flowing from defendants' restraint of trade, once the true markets at issue here are properly analyzed.

Under the target area test employed by some lower courts, a plaintiff lacks standing to assert antitrust damages unless his injury arises in the sector of the economy (or target area) where the violations occurred. [75]

In one classic case, for example, *South Carolina Council of Milk Producers, Inc.* v. *Newton*, [76] the Fourth Circuit held, "if a plaintiff can show himself within the sector of the economy in which the violation threatened a breakdown of competitive conditions and that he was proximately injured thereby, then he has standing to sue under Section 4." [77] Thus, the plaintiff Milk Producers in that case had

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[75] *See, e.g., Mulvey* v. *Samuel Goldwyn Pictures*, 433 F.2d 1073 (9th Cir. 1970) (motion picture producer selling in one market had standing to sue his distributors who had diminished competition in separate distribution market since financial loss from action in target area was reasonably foreseeable). For other variations of the "target area" standing test, *see Pollock* v. *Citrus Associates of the New York Cotton Exchange, Inc.*, 512 F.Supp. 716, 717-18 (S.D. N.Y. 1981). *See also*, cases collected at 512 F.Supp. 718, n. 6. Virtually all "target area" cases in which standing is denied involve plaintiffs whose injury is derivative, and who claim *indirect injury* through the "target." *E.g., Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972) (landlord of target); *Associated Radio Serv. Co.* v. *Page Airways, Inc.*, 624 F.2d 1342, 1362 (5th Cir. 1980), *cert. denied*, 68 L.Ed.2d 226 (1981) (creditor of "target"); *Engine Specialties, Inc.* v. *Bombardier, Ltd.*, 605 F.2d 1 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980) (distributor for "target").

At least one court has rejected both "target area" and "direct injury" tests as "really demand[ing] too much from plaintiffs at the pleading stage of a case," since confusion arises between a litigant's standing and the decision on the merits of his position. *Malamud* v. *Sinclair Oil Corp.*, 521 F.2d 1142, 1149 (6th Cir. 1975).

[76] 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966).

[77] *Id.* at 418.

standing to sue wholesalers and retailers though they did not deal directly with the defendants.

Petitioners confuse this simple standing principle by creating a dual market theory nowhere recognized by the courts and which is totally at odds with the facts of this case. Petitioners suggest that McCready's injury occurred in a different sector of the economy, a "wholly separate market" from the market in which the restraint occurred. [78]

This contention simply ignores the fact that McCready *is* within the sector of the economy threatened by the breakdown of competitive conditions, as the Court of Appeals concluded. [79] A sector of the economy represents the sum total of its integral parts and it is neither good law nor good economics to isolate only one portion of the sector (the suppliers of services) in an effort to achieve the result petitioners now seek. [80]

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[78] Br. for Pet. at 21. Petitioners also attempt to argue that the target area test only applies to targets actually "aimed at" Br. for Pet. at 20, n. 37. There is no basis for this novel "animus" extension of the "target area" test in *Milk Producers* or in any other antitrust case, and it has been squarely rejected by a recent Second Circuit opinion. In *Schwimmer* v. *Sony Corp. of America*, 637 F.2d 41, 47 (2d Cir. 1980), the Court noted that, "while courts frequently focus on the purpose of the antitrust conspiracy, specifically whether it was 'aimed at' the one claiming injury, we do not conclude that a requirement of specific intent should be read into the 'target area' test." All that is required in this regard is that injury to the plaintiff be a "reasonably foreseeable" consequence of the violation. *Id.* at 48. Since violations of the Sherman Act are generally considered intentional torts, *see Texas Industries Inc.* v. *Radcliff Materials, Inc.* ____ U.S. ____, 68 L.Ed. 500, 505 n. 5 (1981), it is consistent with general tort principles to hold a wrongdoer responsible for all the natural and probable consequences of his act, even if his victim is not his intended target. *See* W. Prosser, *Handbook of the Law of Torts* § 8 at 34 (4th ed. 1971).

[79] 649 F.2d at 231.

[80] *E.g., Conference of Studio Unions* v. *Loew's, Inc.*, 193 F.2d 51, 54 (9th Cir.), *cert. denied*, 342 U.S. 919 (1952) (target area evaluated in terms of whether plaintiff produced or exhibited motion pictures or whether it

Here, the sector of the economy involved is the market for distribution of health care services. The critical elements in this sector are health care providers (suppliers), such as physicians, clinical psychologists, therapists, and nurses; their patients (direct consumers who may also be Blue Shield subscribers); and third party payors such as Blue Shield organizations or health care insurance companies. Viewed in this light, McCready not only is within the sector of the economy, but is indeed the crucial link between its participants, for it is her direct relationship with the suppliers and the competition for her dollars that is at the core of the antitrust violation already established in the *VACP* case. Thus, McCready not only was directly injured by the violation, but she was also the instrument of the violation; injury to her was the very means by which the violation was accomplished.

The unlawful objective of petitioners' conduct was to restrain competition between physicians and psychologists by denying payment to Ms. McCready and those who were treated by psychologists. Ms. McCready thus has a much clearer claim for relief than even the plaintiffs in *Milk Producers*. Ms. McCready was in a *direct contractual relationship* with defendants. She was entitled to benefits under defendants' prepaid health care plans. It was by denial of benefits to *her* — not to some other person — that the restraint on competition was perpetrated.

Petitioners' resort to the "antitrust injury" test to deny McCready standing is equally meritless. For the *Brunswick*[81] case, upon which petitioners so heavily rely, compels a finding of antitrust standing, rather than a denial of it.

In *Brunswick*, a plaintiff attempted to apply Section 4 of the Clayton Act in a literal fashion, to produce an anomalous result. The plaintiff operated bowling centers in three markets in which its competitors were failing and could not pay for the bowling equipment

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competed with or bought from sellers in market); *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358, 364 (9th Cir. 1955) ("area of economy" evaluated in terms of who were sellers and buyers of competing products).

[81] *Brunswick Corp.* v. *Pueblo Bowl-O-Mat. Inc.*, 429 U.S. 477 (1977) [hereinafter cited as "*Brunswick*"].

they had purchased from defendant, a large manufacturer of bowling equipment. Defendant acquired those failing competitors and the acquisitions prevented those centers from going out of business. Plaintiff's claimed injury was that it did not enjoy the profits from the increased market share it would have had if its competitors had instead been closed down.

This Court concluded that an antitrust remedy in these circumstances was offensive to the purposes of the antitrust laws, since plaintiff's injury stemmed not from a diminution of competition, but rather from an increase. To be compensable, the Court held, an injury must be an "antitrust injury" or, in other words, "the type of loss that the claimed violations . . . would be likely to cause."[82]

Petitioners use this as a springboard to argue that recovery "should be available only to a plaintiff whose alleged injury results from the anticompetitive effect of an antitrust violation."[83] They urge that recovery must be limited to "cases that actually advance the policies

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[82] *Id.* at 489. *Brunswick* must also be read in context. The claim there was a violation of Section 7, where liability is established by a conclusion that an acquisition *may* tend to lessen competition. Section 7 is, as the Court noted, a prophylactic provision, designed to prevent anticompetitive events. Section 4 is a remedy, designed to provide relief from actual injury due to antitrust violations. Noting that acquisitions, including lawful ones, have many dislocating effects and cause injuries to a variety of interests, the Court held that Section 4 required a showing that the injury (in Section 7 cases) be related to the reason why the acquisition was unlawful:

> We therefore hold that for plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. *Id.*

Even if that analysis is applicable to Sherman Act cases, (some commentators have suggested that it is not applicable) where plaintiff must show that there has been an actual restraint of trade to establish the violation, McCready certainly has alleged standing — a financial injury flowing from a joint refusal to deal with her (J.A. 56-57, ¶ 28).

[83] Br. for Pet. at 16.

of the antitrust laws."[84] However, Petitioners fail to apply those concepts to the violation alleged in the complaint, *i.e.*, a restraint on competition between psychologists and physicians. They argue McCready suffered because her employer chose a health insurance policy that excluded payment to psychologists and her injury thus resulted from the terms of her health policy, not from a reduction of competition.

These arguments completely ignore the complaint, which is the governing document. The complaint alleges a conspiracy among physician-dominated Blue Shield plans to diminish competition between psychiatrists and psychologists. The relevant anticompetitive act pursuant to that conspiracy was the refusal to reimburse McCready for her treatment by a psychologist. Petitioners assert that McCready's losses were not the result of a "reduction in competition,"[85] but that is plainly incorrect, since the purpose and effect of the conspiracy was to reduce the number of *independent* health care providers.

As the Fourth Circuit stated, the complaint alleges a conspiracy to make it too expensive for subscribers to use psychologists. The effect, certainly an "anticompetitive effect," was that McCready had to pay extra; she did not receive the reimbursement which she would have received had there been no violation. Allowing her to assert the claim "advances the policies of the antitrust laws" because McCready is an intended victim of the violation. Injury to her was the device used to restrict competition, and there is no basis in the statute or elsewhere for a rule which would deny her the right to present her claim.[86]

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[84] *Id.* at 15.

[85] *Id.* at 16.

[86] Petitioners also charge that McCready's complaint is an attempt "to profiteer by means of the antitrust laws." Br. for Pet. at 21-22. This argument is baseless. The cited references for the assertion provide no basis for the conclusion that Ms. McCready knew at the time of her initial psychotherapy that Blue Shield would dishonor its contract or defy State law, since she did not indicate she had read the memorandum referred to

II. PETITIONERS' "FACTUAL" McCARRAN-FERGUSON ACT ARGUMENTS ARE NOT PROPERLY BEFORE THIS COURT ON A MOTION TO DISMISS, BUT EVEN IF THEY WERE, THEY ARE FORECLOSED FROM RELITIGATION HERE BY THE JUDGMENT IN A RELATED CASE WHICH FOUND THESE SAME ALLEGATIONS BOTH LEGALLY IRRELEVANT AND FACTUALLY UNSUPPORTABLE

Petitioners also contend that their antitrust violations are not subject to judicial scrutiny under the State regulated "business of insurance" exemption of the McCarran-Ferguson Act.[87] However, these issues are not properly before the Court, since plaintiffs' complaint alleges both a "boycott" and "coercion," conduct which is expressly excluded from the protection of the Act.[88] In addition, these precise issues have been fully and finally determined against the Blue Shield defendants in related litigation. Finally, even on the merits, the challenged conduct is not properly subject to the antitrust exemption and the judgment of the Fourth Circuit below accordingly must be affirmed.

A. McCready's Allegations Of A Boycott And Coercion Are Sufficient To Survive A Motion To Dismiss Under Rule 12(b)(6)

In reviewing petitioners' McCarran-Ferguson Act arguments, it must be remembered that this case arose on a motion to dismiss respondent's complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. It is well-settled that on such a motion, ". . . a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle

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before she sought treatment, or for that matter, submitted her claims to Blue Shield. Petitioners know, in any event, the facts asserted in the memorandum are both inaccurate and legally irrelevant to the issue before this Court.

[87] 15 U.S.C. § § 1011-1015 (1945). The pertinent part of 15 U.S.C. § 1012(b) provides that the Sherman, Clayton and Federal Trade Commission Acts ". . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law." *Id.*

[88] J.A. at 55-56., ¶¶ 25, 27(c).

him to relief."[89] Accordingly, this Court must construe the allegations of the complaint most "favorably to the pleader,"[90] and "must accept as true all material allegations of the complaint."[91]

Application of these principles is particularly important in this case, where defendants seek an exemption from laws which embody fundamental national economic policy. It is "well-settled that exceptions from the antitrust laws are to be strictly construed" especially the McCarran-Ferguson Act exemption.[92] To grant the immunity petitioners now seek, at this early stage of the proceedings before any factual record has been developed, would be singularly inappropriate.[93]

Turning to the pleadings, plaintiff alleges both a boycott and coercion, thus placing petitioners' conduct squarely within the exception to the McCarran Act for "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."[94] A "boycott" within the meaning of the Act has recently and broadly been defined by this Court to include "concerted refusals to deal in cases where the target is a customer of some or all of the conspirators who is being denied access to a desired good or service because of a refusal to accede to particular terms set by some or all of the sellers."[95]

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[89] *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).

[90] *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974). The *Scheuer* Court stated:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether this claimant is entitled to offer evidence to support the claims. *Id.* at 236.

[91] *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975).

[92] *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205 (1979) [hereinafter cited as "*Royal Drug*"].

[93] *Cf.*, *Royal Drug*, 440 U.S. at 207 (issue not considered until summary judgment stage).

[94] 15 U.S.C. § 1013(b) (1945).

[95] *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 544 (1978).

Plaintiff, in her complaint, properly alleges just such a boycott. She states, at paragraph 25:

> The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants and the conspirators, the substantial terms of which have been to exclude and boycott clinical psychologists from receiving compensation under pre-paid health care plans in connection with the furnishing of psychological services including psychotherapy to subscribers of such plans. [96]

She further states in Paragraph 28:

> In furtherance of and as a direct result of the unlawful combination and conspiracy to boycott as herein above alleged, the Blue Shield defendants have unlawfully refused, and continue to refuse, to reimburse plaintiffs for such costs, because psychological services were rendered to them by clinical psychologists rather than physicians. [97]

McCready thus alleges a boycott of clinical psychologists and further, a concerted refusal by petitioners to deal (also a boycott) with her regarding treatment she received from a clinical psychologist. On this motion to dismiss under Rule 12(b)(6), the allegations of the complaint must be taken as true, and for purposes of defendants' motion and subsequent appeal, the conduct challenged is thus squarely within the "boycott" exception to the McCarran-Ferguson Act. Indeed, the district court, in addressing identical McCarran-Ferguson arguments in the related *VACP* litigation, accepted the boycott allegation on the face of the complaint and held the McCarran-Ferguson Act inapplicable. [98]

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[96] J.A. at 55.

[97] J.A. at 56-57.

[98] J.A. at 19. The district court, in denying the motion to dismiss the *VACP* case, relied upon *Ballard* v. *Blue Shield of Southern West Virginia, Inc.*, 543 F.2d 1075 (4th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977), which held that an allegation that Blue Shield defendants "combined and conspired . . . to refuse payment of claims for services rendered by chiropractors, even though claims for identical services rendered by physicians are honored," stated a claim of a group boycott within the meaning of the McCarran Ferguson Act. *Id.* at 1078.

Since the District Court dismissed McCready's complaint for failure to state a claim upon which relief could be granted, petitioners cannot here advance factual arguments for the first time to sustain arguments which they make as a pure matter of law. Their assertions accordingly, that they do not compete [99] or, alternatively, that they are not combinations of competitors, [100] are matters beyond the scope of the complaint and properly must not be considered by the Court. Similar assertions are that the challenged practice is "ancillary to a legitimate joint economic enterprise," that it "has no anticompetitive purpose or effect," or that it "promoted efficiency and therefore had a legitimate economic justification." [101] Even if these assertions were legally relevant to the *trial* of a boycott charge, they are not before the Court in the context of a Rule 12(b)(6) motion.

Because these and other McCarran-Ferguson Act contentions by petitioners could only be accepted if petitioners prevailed on contested factual issues which are not part of the record of this case, the decision below must be affirmed and the case remanded for proceedings in the ordinary course of events in the district court, including an evidentiary hearing, if necessary, on plaintiff's boycott allegations. [102]

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[99] Br. for Pet. at 33-34. Notwithstanding the state statute, petitioners compete for certain areas of their business and, of course, are potential competitors for territories allocated by the State Corporation Commission. Moreover, as demonstrated in the *VACP* case, relied upon by the Court below, the Blue Shield plans are actually collectives of physicians who do compete between themselves and with psychologists, and it was actually the individual and other co-conspirators (J.A. 51, ¶ 15), such as the Medical Society of Virginia, who were the architects of the boycott. *VACP*, 624 F.2d at 480 nn. 3-4, and 481, n.6.

[100] Br. for Pet. at 39-41. This issue has, of course, been fully and finally decided against them. *VACP*, 624 F.2d at 481.

[101] Br. for Pet. at 32, 34. These factual assertions have also been decided against petitioners. *VACP*, 624 F.29 at 484-85.

[102] *Cf.*, *Armstrong* v. *Armstrong*, 350 U.S. 568, 572 (1955) (certiorari dismissed where, after review on merits, case must be disposed of on basis not urged in petition for certiorari).

B. Petitioners Are Precluded From Relitigating The Issue Of Their McCarran-Ferguson Act Exemption By The Final Judgment Against Them In The Related *VACP* Litigation

As demonstrated above, petitioners' McCarran-Ferguson Act arguments could only be considered after development of a full factual record in the district court. But even then it is clear that no actual trial of this issue will be permitted in this case because petitioners are foreclosed by collateral estoppel from relitigating this issue.

The illegal practices alleged by plaintiff in this case are precisely the same practices complained of in the companion *VACP* [103] litigation, as defendants themselves concede when they state "[t]he material allegations of the two complaints are identical." [104] Unlike this case, however, *VACP* proceeded to trial on the merits, where the *identical* McCarran-Ferguson Act issue was litigated and final judgment entered against these same petitioners. [105] Under well-settled principles of collateral estoppel [106] especially as recently announced by this Court in *Parklane Hosiery Co.* v. *Shore*, [107] defendants may not again litigate this issue and will be precluded from so doing in the district court.

Here, as petitioners concede, the McCarran-Ferguson Act issue is "identical" to, and was actually litigated in *VACP*. The issue, which

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[103] *VACP*, 624 F.2d 476.

[104] Br. for Pet. at 9.

[105] *VACP*, 624 F.2d at 483-84.

[106] "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana* v. *United States*, 440 U.S. 147, 153 (1979); *Parklane Hosiery Co. Inc.* v. *Shore*, 439 U.S. 322, 326 n. 5 (1979).

[107] 439 U.S. 322 (1979). In *Parklane*, this Court sanctioned "offensive" use of collateral estoppel, where "a plaintiff is seeking to estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff." *Id.* at 329. Such use of collateral estoppel is appropriate unless procedural advantages available in the second forum, or the plaintiff's "wait and see" attitude with respect to the first litigation causes unfairness to the defendant. *Id.* at 331-32.

would be an affirmative defense to all liability, was obviously necessary to the previous decision, and was fully and fairly determined adversely to these same petitioners. There is no unfairness in "offensive" application of collateral estoppel here since the *McCready* claim was brought together and actually consolidated with the *VACP* litigation until it was dismissed in the district court. [108]

Petitioners themselves have previously recognized that final determination in *VACP* of issues common to both cases necessary precludes their relitigation in *McCready*. In an earlier brief in the Court of Appeals, [109] after their initial district court victory in *VACP*, petitioners argued that *McCready* and all class members would be bound by the *VACP* result, since the issues were identical and a full and fair opportunity was provided for their litigation. According to Blue Shield:

> The *VACP* case was extensive, time consuming and extremely costly to defend. Upon a full and fair hearing on all issues, defendants prevailed. McCready now seeks to relitigate these issues should this Court reverse the District Court on the question of standing. There is no justification for allowing her to do so. She cannot assert that VACP and Resnick failed to discover or introduce all relevant evidence, that they neglected to present any credible claim, or that there were any errors in substantive, procedural or evidentiary law or in trial strategy. [110]

Appellants further objected to McCready continuing with her case since she could not expect to obtain a different result from the decision of the other district court:

> McCready's sole hope of recovery in this action lies in gaining an inconsistent determination from a different fact finder on the

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[108] Because evaluation of the *Parklane* criteria, such as unfairness to defendants and whether plaintiff could have easily intervened, are also matters which depend upon factual findings and a record not before this Court, this issue should also be determined in the first instance in the district court.

[109] "Brief in Support of Appellees' Motion to Stay or Consolidate Appeal," (May 17, 1979), *McCready*, 649 F.2d 228.

[110] *Id.* at 10.

> same evidence. Under these circumstances, it would be inappropriate and inequitable to force appellees to once again undergo time-consuming, costly litigation to relitigate issues already determined. [111]

On appeal, however, the Fourth Circuit ruled that the conduct challenged by both McCready and VACP constituted an unlawful restraint of trade in violation of Section 1 of the Sherman Act. [112] With specific reference to the McCarran-Ferguson Act, the Court held that the practices complained of were not the State regulated "business of insurance" within the meaning of the Act:

> The essence of the business of insurance is the relationship between the insurance company and its policyholder. We are persuaded that the defendants' policy regarding payment of clinical psychologists is only tangential to that relationship in that it does not affect the benefit conferred upon the subscriber. (Citations omitted.)
>
> Were we confronted with a decision by the Plans to deny payment for mental and nervous disorders or psychotherapy as a method of treating those disorders we might conclude that the decision was an insurance decision — the refusal to underwrite a specific risk. In the present case, however, both Plans have been covering these mental and nervous disorders in their contracts since at least 1962. Their decision regarding psychologists was not whether to underwrite the risk of those disorders or even the need for psychotherapy; rather it was a question of who they would pay for such services. The coverage remained the same. [113]

In accordance with this Court's decision in *Group Life and Health Insurance Co.* v. *Royal Drug Co.*, [114] the court thus held that precisely the same practices alleged in McCready's complaint could not be subject to McCarran-Ferguson Act exemption even *after a full factual hearing*.

The case for precluding relitigation of the McCarran-Ferguson Act defense is far more compelling than before, now that final judgment

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[111] Id.

[112] *VACP*, 624 F.2d at 483-84.

[113] *Id.* at 483-84.

[114] 440 U.S. 205 (1979).

has been entered for the *VACP* plaintiffs. Defendants, in arguing that the *McCready* class should be bound, relied on tenuous assertions of privity between the plaintiffs in the two related cases, specifically, that they were represented by common counsel. By contrast, *defendants* in both cases were identical and there can be no contention that any party was denied a full and fair opportunity to litigate the McCarran-Ferguson Act defense. [115]

Petitioners here may attempt to collaterally attack the judgment in *VACP*, but such an attack cannot be permitted. [116] Defendants have had a full and fair opportunity to present all facts and all legal arguments respecting their defenses in the district court, in the Court of Appeals and, upon a petition for a writ of certiorari, in this Court. To permit relitigation of the issue would violate not only principles of judicial economy, but also well settled rules of finality of judgments.

For this reason as well, the McCarran-Ferguson Act issue is not a proper subject for consideration by this Court, but should be determined by the district court when this case is remanded.

C. Petitioners Cannot Claim McCarran-Ferguson Act Exemption For Their Illegal Boycott Since Their Conduct Is Not The Business Of Insurance And They Are Not Insurance Companies

Based both upon proper standards of consideration of a motion to dismiss under Rule 12(b)(6) and upon the prohibitions against relitigation of issues fully and finally determined against a party in related litigation, the Court should decline to review petitioners'

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[115] The Neuropsychiatric Society of Virginia, "NSV," was also a party to the *VACP* case, but was exonerated from antitrust liability on the merits by the Fourth Circuit. *VACP*, 624 F.2d at 483.

[116] Inexplicably, petitioners do not address the collateral estoppel issue in their brief on the merits, although it was raised by respondent in opposing their petition for certiorari. They instead treat the *VACP* decision as a mere contrary authority in a lower federal court and thus impair Respondent's ability to respond to their arguments as to why they should not be conclusively bound by the obviously controlling holding in that case.

assertion that Ms. McCready's claim is within the McCarran-Ferguson Act exemption to the antitrust laws.

But even on the merits, the conduct of the Blue Shield Plans here is not entitled to exemption. "It is well settled that exemptions from the antitrust laws are to be narrowly construed," [117] and the Court, upon careful consideration, will conclude that the exemption does not apply here because: first, their illegal practices are not within the State regulated "business of insurance"; second, the conduct constitutes a boycott within the meaning of the Act; and third, the Blue Shield Plans are not insurance companies and accordingly are not entitled to the protection of the statute.

1. The challenged policy is not the "state regulated" "business of insurance"

The McCarran-Ferguson Act shields the "business of insurance" from antitrust scrutiny only "to the extent that such business is not regulated by State law." [118]

Any construction of this language as applied to Blue Shield plans must begin with a review of this Court's recent decision in *Group Life and Health Insurance Co.* v. *Royal Drug Co.* [119] The Court there held that a Blue Shield policy regarding terms of payment to particular provider groups was not the "business of insurance," *even though it was indirectly referred to in subscriber contracts*, because it did not relate either to the risks that were underwritten or to the relationship between the insurer and the insured, which is "the core of the business of insurance." [120]

The Blue Shield defendant in *Royal Drug* had entered into agreements with certain "participating pharmacies" concerning payment for covered prescription drugs purchased by its subscribers. Plaintiffs in the case were independent pharmacies who contended that the

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[117] *Royal Drug*, 440 U.S. at 231 and cases cited therein.

[118] 15 U.S.C. § 1012(b) (1945).

[119] 440 U.S. 205 (1979).

[120] *Id.* at 216.

differing payment/reimbursement policies followed with respect to the two categories of pharmacies amounted to a price-fixing agreement or a group boycott, because they caused Blue Shield's subscribers "not to deal with certain of the respondents." [121]

The Court held that the provider agreements in question were not the "business of insurance" because they "did not involve any underwriting or spreading of risk, but [were] merely arrangements for the purchase of goods and services by Blue Shield." [122] As such, the agreements were "legally indistinguishable from countless other business arrangements that may be made by insurance companies to keep their costs low and thereby also keep low the level of premiums charged to their policyholders." [123] Noting that the McCarran-Ferguson Act protects the "business of insurance" and not the "business of insurers," the Court also held that the pharmacy agreements could not be considered part of the business of insurance even though they were "indirectly referred to in the insurance policies." [124]

Similarly, the policies of Blue Shield at issue here cannot be the "business of insurance" because they neither touch upon the underwriting of risks nor concern the relationship between the subscriber and Blue Shield. The Blue Shield Plans decided to underwrite the risk that some of their subscribers would require psychotherapy for treatment of nervous and mental disorders. The challenged policy of excluding clinical psychologists as providers of the covered services, however, had nothing to do with that insurance decision as the Fourth Circuit has noted:

> Their decision regarding psychologists was not whether to underwrite the risk of those disorders or even the need for psychotherapy; rather it was a question of who they would pay for such services. The coverage remained the same. [125]

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[121] *Id.*

[122] *Id.* at 214.

[123] *Id.* at 215.

[124] *Id.* at 216, n. 14.

[125] *VACP*, 624 F.2d at 484.

Petitioners now contend that their policy of requiring M.D. supervision and billing of psychologists' services *does* affect the risk undertaken, allegedly because the "medical necessity" of the treatment is thereby assured. [126] This argument was considered and rejected by the Fourth Circuit in *VACP*, however, when it found that the policy, by its very terms fails to fulfill that goal:

> Any assertion that a physician must actually *supervise* the psychologist to assure the quality of the psychotherapy treatment administered is refuted by the policy itself. The Blue Shield policy provides for payment to psychologists for psychotherapy if billed through *any* physician — not just those who regularly treat mental and nervous disorders. It defies logic to assume that the average family practitioner can supervise a licensed psychologist in psychotherapy, and there is no basis in the record for such an assumption. [127]

Blue Shield similarly cannot contend that the supervision and bill-through policy concerns the relationship between Blue Shield and its subscribers, because the essential element of that relationship, as this Court noted in *Royal Drug*, is the decision to underwrite and pay for a particular risk. [128] Petitioners seem to argue that simple reference to a policy in a subscriber contract is all that is required to entitle Blue Shield to the protection of the McCarran-Ferguson Act. [129] However, even if the M.D. supervision and billing require-

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[126] Br. for Pet. at 26-27. This bald factual assertion is entitled to no weight here, especially since, when tested in a related adversary proceeding, it was expressly rejected.

[127] *VACP*, 624 F.2d at 485 (emphasis in original).

[128] *Hahn* v. *Oregon Physicians' Serv.*, 508 F.Supp. 970 (D. Ore. 1981), is not to the contrary. There, where defendants imposed a physician referral requirement on treatment by podiatrists, the state licensing statute required close collaboration and supervision by M.D.'s as a condition of performance by podiatrists of many covered services. Here, of course, by state law, clinical psychologists are completely independent providers of psychological services. *VACP*, 624 F.2d at 485.

[129] Br. for Pet. at 25-27. *Compare*, *Hoffman* v. *Delta Dental Plan*, 517 F.Supp. 564, 569 (D. Minn. 1981) (mere inclusion of provider payment provision in subscriber contracts does not entitle policy to McCarran-

ment were a part of subscriber contracts, which it was not,[130] this alone would be insufficient. The subscribers in the *Royal Drug* case were apprised of the distinction between participating and nonparticipating pharmacies in their contracts and were exposed to differing consequences depending on which class of provider they chose for the covered drugs.[131] In this sense, the Blue Shield practice here is no different from that challenged in *Royal Drug* and is similarly entitled to no exemption.

All discussion of the *Royal Drug* case aside, it is also clear that the Blue Shield policy which has also been found to be in violation of state law, cannot purport to be part of the "State regulated" "business of insurance." By state law,[132] the Blue Shield Plans were required to pay clinical psychologists on a non-discriminatory basis for services they were authorized by law to perform and which were covered by Blue Shield contracts. To assert the protection of a statute designed to permit state regulation of the insurance industry on the basis of a policy of deliberate defiance of State law would truly undermine the very purpose of the McCarran-Ferguson Act and should not be permitted.[133]

Ferguson Act exemption; to hold otherwise would exalt form over substance) *with Klamath Lake Pharmaceutical Ass'n* v. *Klamath Medical Service Bureau*, 507 F.Supp. 980 (D. Ore. 1981) (contra).

[130] The "supervision and bill-through" requirement manifestly does not appear in Ms. McCready's contract, but rather, was a matter of internal Blue Shield claims policy. The contract makes express references only to "physician," which nevertheless also includes within its scope podiatrists, osteopaths and other non-M.D. providers.

[131] As this Court noted, the subscriber was required to pay a $2 fee whether a participating or non-participating pharmacy was chosen. No further fees were due if the pharmacy had signed a Pharmacy Agreement, while if the pharmacy was non-participating, the subscriber could obtain reimbursement from Blue Shield only for 75 percent of the difference between the actual cost of the prescription and the $2 minimum. 440 U.S. at 209.

[132] Va. Code § 38.1-824 (1981).

[133] *Cf.*, *VACP*, 624 F.2d at 482, n. 10 ("state action" defense *a fortiori* not implicated because "state does not even permit the challenged policy").

2. The challenged conduct constitutes a boycott within the meaning of the McCarran-Ferguson Act

Regardless of whether the challenged Blue Shield conduct is the state-regulated "business of insurance," it clearly constitutes a boycott within the meaning of Section 3(b) of the McCarran-Ferguson Act. [134]

This Court's most recent discussion of this section of the Act is found in the case of *St. Paul Fire & Marine Insurance Co.* v. *Barry*, [135] in which the Court held that the meaning of the term "boycott" is coextensive with the usual Sherman Act definition of that term and extends to all concerted refusals to deal. McCready alleges that the Blue Shield Plans refused to deal with clinical psychologists and furthermore refused to deal with her when she obtained covered psychological services from a licensed clinical psychologist. [136]

Either of these allegations is sufficient to state a claim of a boycott under the Sherman Act. The plans jointly, and as combinations of their member physicians, refused to deal with clinical psychologists or with her directly if she chose to deal with clinical psychologists. According to the complaint, the petitioners boycotted both McCready and the psychologists. In this respect, it is similar to the situation described by the *Barry* court, which noted that:

> The generic concept of boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target. [137]

Here the essential elements of the boycott were to pressure McCready and other Blue Shield subscribers to withhold patronage from clinical psychologists as a means of enforcing the Blue Shield Plans' and the member physicians' dispute with the psychologists. The plans likewise refused to deal with McCready when she in fact dealt with the clinical psychologists and sought reimbursement for the cost of psychological care to which she was entitled under her contract.

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[134] 15 U.S.C. § 1013(b) (1945).

[135] 438 U.S. 531 (1978).

[136] J.A. at 55-57.

[137] *Barry*, 438 U.S. at 541.

Petitioners are simply incorrect when they argue that there can be no boycott here because there is allegedly no agreement among competitors. Certainly after *Barry*, there is no basis for reading into the Sherman Act a requirement that boycotters compete among themselves; [138] but even if there were, such competition is present here. As the Fourth Circuit held in *VACP*, the plans are merely agents for their member physicians who compete among themselves and with clinical psychologists. [139] Following *United States* v. *Sealy, Inc.*, [140] the court held that these plans not only are made up of member physicians but that they are actually controlled by them having, for all periods relevant to this case, M.D. physician majorities on their boards of directors through whom effective control was excercised. Thus, the combination of competitors the petitioners find so necessary to a boycott within the meaning of the McCarran-Ferguson Act is clearly present here. Petitioners are also incorrect when they assert, with no authority whatsoever that Section 3(b) refers only to "naked" concerted refusals to deal. [141]

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[138] In distinguishing the *Ballard* case, *Ballard* v. *Blue Shield of Southern West Virginia, Inc.*, 543 F.2d 1075 (4th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977), petitioners gratuitously assert that the Fourth Circuit "must have assumed (without discussion) that the West Virginia plans competed with one another." Br. for Pet. at 38. The Sherman Act prohibitions against "concerted refusals to deal" are not, as this Court on more than one occasion has noted, limited to horizontal combinations among competitors. *E.g. United States* v. *General Motors Corp.*, 384 U.S. 127 (1966) (combination between manufacturer and dealer to prohibit sales to "discount houses;" *Klor's, Inc.* v. *Broadway-Hale Stores Inc.*, 359 U.S. 207 (1959) (combination between dealer and distributor to restrict sales to competing dealer).

[139] 624 F.2d at 481.

[140] 388 U.S. 350 (1967).

[141] Br. for Pet. at 32; *see St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 542. *Worthen Bank & Trust Co.* v. *National Bank Americard, Inc.*, 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974) is inapposite, since the court did not purport to rule on the merits of the claimed illegal restraint. It held only that, due to the nature of the combination, no *per se* illegality analysis was appropriate. *Cullum Elec. & Mechanical Inc.* v. *Mechanical Contractors' Ass'n*, 436 F.Supp. 418 (D.S.C. 1976), *aff'd* 569

Moreover, McCready and her class will show at trial in this case that the Blue Shield plans do in fact compete for certain segments of the health care market. The facts respondent would show to prove this issue are not a matter of record in this case and are not properly before the Court at this time, but certainly, she should be allowed, at an appropriate time, to demonstrate that this is the case.

3. The Blue Shield Plans are not insurance companies and accordingly are not entitled to the protection of the McCarran-Ferguson Act

The Blue Shield Plans are not, technically speaking, insurance companies but instead are prepaid health care plans which contract with subscribers and group contract holders to provide health care services, in kind, to subscribers for a set fee. The Blue Shield plans accordingly do not underwrite risks, especially since their member physicians agree as participating physicians to perform all covered services in return for whatever money is available through the plans. Because of their special status, Blue Shield plans are not generally considered to be insurance companies and are immune from certain aspects of state regulation and taxes. [142]

Because the Blue Shield Plans accordingly do not underwrite risks and do not engage in the business of insurance, they should not be entitled to the protection of the McCarran-Ferguson Act and the judgment of the Fourth Circuit should be affirmed on this basis.

F.2d 821 (4th Cir. 1978), *cert. denied*, 439 U.S. 910 (1978) is likewise not controlling because the court there held that there was no boycott because membership in the defendant bid depository was open to all bidders on an equal basis.

[142] *See generally, Royal Drug*, 440 U.S. at 225-30.

CONCLUSION

Carol McCready's Complaint cannot be dismissed at this preliminary stage of the proceedings. She has alleged a financial injury in fact directly caused by Petitioners' boycott restraining the delivery of health care services and a decision denying her standing would conflict with this Court's precedents, the intent of Congress, and sound considerations of antitrust enforcement policy, but most importantly, would deny consumer victims of antitrust violations their day in court, by depriving them of a chance to prove the facts which they allege in good faith caused them injury. Moreover, it would defy both reason and logic to allow antitrust defendants to assert an immunity from federal antitrust laws, which they have already been found guilty of violating, when the practices they engaged in were not consistent with State regulation, but in fact were in contravention of it.

For all these reasons, this case must be remanded to the District Court in order to allow Carol McCready and other subscribers deprived of their lawfully earned benefits an opportunity to prove their case.

Respectfully submitted,

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STATUTORY APPENDIX

CODE OF VIRGINIA

§ 38.1-824. Services of certain practitioners other than physicians to be covered. — No plan for furnishing prepaid medical and surgical, and similar or related services, or any of such services, shall fail or refuse, either directly or indirectly, to allow or to pay for such services, or any part thereof, rendered by any doctor of podiatry, doctor of chiropody, optometrist, optician, psychologist, or clinical social worker duly licensed to practice in Virginia, to the holder of any contract or subscription contract issued under or pursuant to such plan if the services rendered (i) are services provided for by such contract or subscription contract and, in the case of services by a clinical social worker, have been specifically contracted for by the holder of any such contract or subscription contract, which coverage must be made available to the holder of such contract, and (ii) are services which the doctor of podiatry, doctor of chiroprody, optometrist, optician, psychologist, or clinical social worker is licensed to render in Virginia (Code 1950, § 32-195.10:1; 1966, c. 276; 1973, c. 428; 1979, cc. 13, 721; 1980, c. 682.)

Petitioner's Reply Brief

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

BLUE SHIELD OF VIRGINIA,
BLUE SHIELD OF SOUTHWESTERN VIRGINIA,
AND
NEUROPSYCHIATRIC SOCIETY OF VIRGINIA, INC.,
Petitioners,
v.
CAROL MCCREADY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a subscriber to a prepaid health care plan, purchased by her employer in an unrestrained insurance market, has standing under § 4 of the Clayton Act to complain that the plan is boycotting clinical psychologists by failing to cover their services?

2. Whether the term of a health insurance contract that limits coverage to services performed by physicians is exempt from the antitrust laws as part of the "business of insurance" within the meaning of § 2 of the McCarran-Ferguson Act, where plaintiff does not allege a "boycott" within the meaning of § 3(b) of the McCarran-Ferguson Act?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-225

BLUE SHIELD OF VIRGINIA,
BLUE SHIELD OF SOUTHWESTERN VIRGINIA,

AND

NEUROPSYCHIATRIC SOCIETY OF VIRGINIA, INC.,
Petitioners,

v.

CAROL MCCREADY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

Petitioners Blue Shield of Virginia (the "Richmond Plan"), Blue Shield of Southwestern Virginia (the "Roanoke Plan") and the Neuropsychiatric Society of Virginia, Inc. ("NSV") submit this brief in reply to the brief of respondent Carol McCready ("McCready"). The list required by Rule 28.1 of the Rules of this Court is contained in the petition for certiorari.

I. The Simplistic "Causation In Fact" Standing Test Adopted By The Fourth Circuit Below And Advocated By McCready Is Contrary To This Court's Decisions And To Sound Antitrust Policy

(a) McCready Advocates Standing For Every Plaintiff Whose Injury Conceivably Can Be Traced To An Antitrust Violation

In her brief, McCready flatly advocates the simplistic "causation in fact" test for standing, which has been rejected by virtually every court that has decided this issue:

> Carol McCready's Complaint alleges financial injury in fact and a direct causal relationship between that injury and petitioners' acts in restraint of trade in the delivery of health care services. She thus alleges injury to her property by reason of a violation of the antitrust laws. These allegations . . . are sufficient to confer standing.[1]

According to McCready, therefore, all she must allege in order to have standing under § 4 of the Clayton Act is that she has suffered a financial loss that was caused in the simple, factual sense by the alleged antitrust violation.

The simplistic test advocated by McCready, however, is not the law. Under the rule advocated by McCready, creditors,[2] landlords,[3] shareholders,[4] employees[5] and sup-

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[1] McCready brief, pp. 10-11.

[2] *Associated Radio Serv. Co.* v. *Page Airways, Inc.*, 624 F.2d 1342, 1362 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981).

[3] *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

[4] *Loeb* v. *Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910).

[5] *Reibert* v. *Atlantic Richfield Co.*, 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973).

pliers[6] would all have standing, because such plaintiffs can all allege injury that is caused by an antitrust violation. Nonetheless, such plaintiffs have consistently been held to lack standing. As this Court noted in *Hawaii* v. *Standard Oil Co.*,[7] "[t]he lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might *conceivably be traced to an antitrust violation.*"

Indeed, the only court to agree with the rule advocated by McCready is the Fourth Circuit in its decision below. The thrust of the Fourth Circuit's decision is to require only that a potential antitrust plaintiff show that his loss was caused in the simple, factual sense by an alleged violation. Aside from exposing antitrust defendants to a "myriad" of lawsuits,[8] the Fourth Circuit's rule utterly divorces the recovery of treble damages from the fundamental policies of the antitrust laws. For these reasons, the Fourth Circuit's rule must be rejected.

In her brief, McCready does not consistently adhere to the simplistic "causation in fact" rule. She suggests at one point that antitrust standing should depend on the "foreseeability" of the injury caused by the alleged violation.[9] McCready does not distinguish between the "causation in fact" rule and the "foreseeability" rule, although these two rules are quite distinct and equally erroneous. The "foreseeability" rule is wrong because (like the "causation in fact" rule) it fails to link the recovery of treble damages to the underlying policies of the antitrust laws. As Areeda and Turner state, "[w]hat

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[6] *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 293 (1971).

[7] 405 U.S. 251, 262 n.14 (1972) (emphasis added).

[8] *Pan-Islamic Trade Corp.* v. *Exxon Corp.*, 632 F.2d 539, 547 (5th Cir. 1980), *cert. denied*, 102 S.Ct. 427 (1981).

[9] McCready brief, p. 15.

is foreseeable or even intended is not necessarily appropriate for antitrust protection." [10] What *is* appropriate for antitrust protection must be determined by reference to the policy of preserving competition.

No doubt McCready veers from the "causation in fact" rule to the "foreseeability" rule because these are the only two rules under which she could have standing. Nonetheless, these rules are mistaken and inappropriate, and they should be rejected.

(b) McCready's Brief Supports The Conclusion That Her "Loss" Does Not Flow From The Alleged Violation And Therefore She Lacks "Antitrust Injury"

The Plans and NSV, in their main brief, argued that McCready lacks antitrust injury because her loss—the denial of reimbursement under her health insurance contract—did not flow from any reduction in competition caused by the alleged violation. This argument takes as its fundamental premise that recovery of treble damages must be linked to the underlying policy of the antitrust laws, which is to preserve competition.[11] If a plaintiff's loss is not related to a reduction in competition, then that plaintiff should not recover punitive treble damages.

McCready, in her brief, lends support to the conclusion that her "loss" was not due to any reduction in competition caused by the alleged violation:

> Petitioners assert that McCready's losses were not the result of a "reduction in competition," but that is plainly incorrect, since the purpose and effect of

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[10] 2 P. Areeda & D. Turner, *Antitrust Law*, § 334, at p. 166 (1978). *See Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1296 n.2 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972) ("the 'foreseeability' test . . . would permit anyone to sue").

[11] *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *GAF Corp.* v. *Circle Floor Co.*, 463 F.2d 752, 757-58, (2d Cir. 1972), *cert. dismissed*, 413 U.S. 901 (1973).

> the conspiracy *was to reduce the number of independent health care providers.*[12]

This statement in McCready's brief is critical. There is no allegation in McCready's complaint of any reduction in the number of "independent health care providers." Furthermore, there is no dispute that the "loss" that McCready claims is the reimbursement denied her by the Richmond Plan.[13] This denial of reimbursement, whether right or wrong, whether consistent with the terms of her health insurance contract or not, is certainly not caused by any reduction in the number of "independent health care providers." In other words, McCready's "loss" is not connected to any suppression of competition.

McCready cannot escape the fact that she is claiming a "loss" that flows from the terms of her health insurance contract, and not from any reduction in competition. (Even assuming, for the sake of argument, that the denial of reimbursement resulted from the physician supervision requirement, rather than from the strict terms of her health insurance contract, it still did *not* result from any reduction in competition.) When the case is stripped to its essentials, this is why McCready lacks standing: her "loss" has no connection with a suppression or reduction of competition. Since the antitrust laws were enacted to preserve competition, the recovery of punitive treble damages by McCready would be utterly divorced from the policies of the antitrust laws.

McCready herself characterizes the alleged antitrust violation here as a conspiracy to reduce the number of independent health care providers. That conspiracy could only be implemented by diverting patients away from clinical psychologists by failing to cover their services in

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[12] McCready brief, p. 29 (note omitted, emphasis in original and added).

[13] *See, e.g.*, McCready brief, p. 6; McCready Complaint, ¶ 28, J.A. 56-57.

the health insurance contract. The anticompetitive effect of the alleged conspiracy was to take business from clinical psychologists, and the purpose of the antitrust laws will be served in this case only if any compensable injury reflects this anticompetitive effect.

Ironically, McCready seeks to recover damages for diversion of clients from clinical psychologists, yet McCready herself *was not diverted.* As to her, the alleged antitrust violation had *no effect on competition.* Indeed, had all Plan subscribers acted as did McCready, the alleged conspiracy would have produced no effect on competition at all. Since McCready alleges no injury that reflects suppression of competition, she has suffered no antitrust injury and has no standing in this action.

(c) Congress Intended The Antitrust Laws To Be Vigorously Enforced, But Only In Ways That Advance Their Underlying Policy

In her brief, McCready argues that she should have standing under § 4 of the Clayton Act because she is seeking to enforce the antitrust laws, and Congress intended those laws to be vigorously enforced. Counsel for the Plans and NSV have reviewed the relevant legislative history of § 4 of the Clayton Act and former § 7 of the Sherman Act, but have discovered no expression of Congressional intent regarding the limits of the universe of plaintiffs eligible to recover treble damages.[14] Yet certainly Congress did not intend the punitive treble damage remedy to be available in cases that do not advance the underlying policy of the antitrust laws, which is to preserve competition. McCready's case does not satisfy this test, because her "loss" is unrelated to any suppression or reduction of competition.

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[14] *See* Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809, 812 n.9 (1977) ("As far as can be discerned, however, Congress paid no attention to whether certain classes of plaintiffs would be denied standing to sue under the 'by reason of' language of § 7 of the Sherman Act, the predecessor of § 4 of the Clayton Act).

Furthermore, to the extent that the violations alleged in McCready's complaint actually implicate the policies of the antitrust laws, those policies can be vindicated in the separate action that has been brought by the Virginia Academy of Clinical Psychologists (which was filed on the same day and in the same court as McCready's action),[15] and by the treble damage actions that have been brought by individual clinical psychologists.[16]

Indeed, according to Areeda and Turner, "most standing denials are based on the existence of an alternative plaintiff whose injury was more immediate, more substantial, and more closely related to the reasons for condemning the defendant's conduct." [17] The Fourth Circuit in its decision below admitted that the alleged violation was directed at clinical psychologists (and not at McCready),[18] and the purpose of the alleged violation was to suppress competition between clinical psychologists and psychiatrists. Remarkably, McCready even claims that the alleged violations by the Plans do not "concern the relationship between the subscriber and Blue Shield." [19] Thus, McCready lacks standing because there are alternative and more suitable plaintiffs whose injury is more closely related to the alleged violation than is the "loss" sustained by McCready.

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[15] *Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia*, 469 F.Supp. 552 (E.D. Va. 1979), *aff'd in part and rev'd in part*, 624 F.2d 476 (4th Cir. 1980), *cert. denied*, 101 S.Ct. 1360 (1981) (hereinafter cited as *VACP*).

[16] *See* Petitioners' main brief, p. 9.

[17] 2 P. Areeda & D. Turner, *Antitrust Law*, § 383, at pp. 161-62 (1978).

[18] J.A. 31.

[19] McCready brief, p. 39.

(d) Reiter v. Sonotone Corp. And Illinois Brick Co. v. Illinois, Contrary To McCready's Argument, Are Consistent With A Finding That McCready Lacks Standing

McCready inexplicably relies on this Court's decision in *Reiter* v. *Sonotone Corp.*,[20] where Reiter alleged a conspiracy to fix the retail prices she paid for hearing aids. The complaint in *Reiter* included the following allegation:

> The intended and actual effects of the offenses heretofore alleged were and are that defendants and coconspirators:
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> . . . .
>
> Raised, fixed, stabilized and maintained at noncompetitive levels prices of hearing aids and equipment *sold by defendant corporations and coconspirators to plaintiff and members of the class.*[21]

Reiter's complaint contained numerous other allegations that defendants had fixed the retail prices of hearing aids.[22] Indeed, had Reiter *not* alleged a conspiracy to fix the retail prices of hearing aids, she would not have satisfied the "direct purchaser" rule of *Illinois Brick Co.* v. *Illinois.*[23]

Reiter alleged exactly what McCready did not and cannot allege: higher prices caused by suppression of competition. Therefore, Reiter had standing, and McCready does not. *Reiter* is completely consistent with a finding that McCready lacks standing.

If McCready were seeking recovery for the amount of an alleged increase in the price she paid for the serv-

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[20] 442 U.S. 330 (1979) (hereinafter cited as *Reiter*).

[21] *Reiter* complaint, ¶ 25 (emphasis added), *reprinted in* appendix to *Reiter* petition for certiorari.

[22] *Id., e.g.*, ¶ 23.

[23] 431 U.S. 720 (1977) (hereinafter cited as *Illinois Brick*).

ices of a clinical psychologist, and if she alleged that this increase was caused by the alleged violations, then she might have standing. McCready, however, does *not* claim that the alleged violation increased the price to her of the services of clinical psychologists, and she admits that her only "loss" was the denial of reimbursement by the Richmond Plan.

In her brief, McCready states that *Illinois Brick* is "not inconsistent" with a finding that she has standing.[24] *Illinois Brick* is not directly on point here, because it involved price-fixing, while McCready's complaint does not. Nonetheless, *Illinois Brick* is significant because of the similarity between an indirect purchaser and McCready, whose health insurance contract was purchased by a middleman, her employer. In *Illinois Brick*, this Court denied recovery to an indirect purchaser who purchased through a middleman; a finding that McCready lacks standing would be entirely consistent with this result.

In her analysis of *Illinois Brick*, McCready focuses only on this Court's concern with avoiding double recovery of damages. Indeed, throughout her brief, McCready appears to argue that rules governing standing under § 4 should go no further than the mere prevention of double recovery. This is not the law. For example, in *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*,[25] the Second Circuit denied standing under § 4 to a landlord who sought treble damages for the reduction in rent resulting from an antitrust violation directed at his tenant. Yet allowing the landlord to recover would have posed no threat of a double recovery. The landlord was seeking three times the lost rent resulting from the violation, while his tenant (the direct object of the viola-

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[24] McCready brief, p. 22.

[25] 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

tion) could have sought three times either lost profits or the amount of any overcharge caused by the violation. Neither lost profits nor the overcharge would have duplicated the lost rent sought by the landlord. Thus, McCready's emphasis on avoiding double recovery is not supported by settled standing doctrine.

(e) McCready Seeks To Avoid The "Target Area" Rule By Collapsing Into A Single Market The Market For Health Insurance And The Wholly Separate Market For Psychotherapy

In her brief, McCready accepts the following statement of the "target area" rule:

> Under the target area test employed by some lower courts, a plaintiff lacks standing to assert antitrust damages unless his injury arises in a sector of the economy (or target area) where the violations occurred.[26]

Thus, McCready agrees with the Plans and NSV that the "target area" rule requires that the injury and violation occur in the same market.

In this case, McCready's "loss"—the denial of reimbursement—did not occur in the market for psychotherapy. Rather, it occurred in the market for health insurance, because this "loss" flowed from the terms of McCready's health insurance contract, which was purchased by her employer in an unrestrained market. Whether or not McCready is reimbursed for certain services under a health insurance contract is clearly a matter involving the market for health insurance.

It is ludicrous to assert, as does McCready,[27] that the market for health insurance and the market for psycho-

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[26] McCready brief, p. 25 (note omitted).

[27] McCready brief, p. 27. Nothing in McCready's complaint supports her assertion that psychotherapy and health insurance contracts are sold in the same market.

therapy are a single market. Psychotherapy and health insurance contracts are different products sold by different vendors to different types of purchasers. (McCready's health insurance contract, for example, was purchased by a local government, Prince William County.) Thus, under the "target area" test, McCready lacks standing because her "loss" occurred in one market, while the violation she alleges occurred in another.

II. McCready's Brief Is Factually Inaccurate

McCready's brief contains assertions that are contrary to the record and, although none of these inaccuracies is critical to the decision in this case, the Plans and NSV wish to correct them:

First, McCready asserts that the Plans' health insurance contracts provide coverage for the services of clinical psychologists.[28] The simplest answer to this assertion is on page 66 of the Joint Appendix, where the relevant provisions of the health insurance contract appear. Paragraph 10 of the health insurance contract defines "Covered Medical Expenses" to mean "medically necessary services performed or prescribed . . . by a Physician in a treatment of an illness or accidental injury." Following this definition there is a list of fourteen specific types of services that are covered by the health insurance contract, including "Services of Physicians." There is no reference to the services of clinical psychologists.[29]

In 1972, the Richmond Plan adopted the physician supervision requirement, which interpreted the coverage of the health insurance contracts to include the services of clinical psychologists under certain conditions. Be-

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[28] McCready brief, pp. 9 and 29. In her complaint, McCready took the opposite position that her health insurance contract by its terms did *not* cover the services of psychologists. McCready Complaint ¶ 10; J.A. 50.

[29] The definition of "Physician" in the health insurance contract does not include clinical psychologists. J.A. 66.

cause this interpretation *expanded* the coverage of the health insurance contract, it plainly cannot be the basis for any complaint against the Plans. McCready does not discuss the terms of the contract, but instead relies on a remark by the Fourth Circuit in *VACP* that "[b]etween 1962 and 1972, Richmond Plan coverage included direct payment to psychologists for psychotherapy rendered to subscribers," [30] which contradicts the clear words of the contract itself and is flatly contrary to a specific finding by the district court in *VACP*.[31]

In any event, it is irrelevant to the standing issue whether McCready was denied reimbursement because of the terms of her health insurance contract, or because of the physician supervision requirement, since in neither case would the denial of reimbursement have any connection with any reduction or suppression of competition between psychiatrists and clinical psychologists.

Next, McCready denies that her employer, which acted as an independent middleman, could have elected to buy a more expensive group insurance contract that covered the services of clinical psychologists.[32] Yet the district court below stated that, "[t]here is no suggestion that [McCready] cannot obtain insurance coverage for psychological treatment from insurance carriers other than defendant providers." [33]

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[30] *VACP*, 624 F.2d at 478.

[31] The district court in *VACP* found, "[t]here is evidence that [before 1972] clinical psychologists had been paid for services independently rendered and yet it is not clear that this was company policy. Instead, it appears that it resulted from a lack of company policy." 469 F. Supp. at 558.

[32] McCready brief, pp. 19-20.

[33] J.A. 18. As Judge Widener stated in his dissent below:

> If a group of people (the subscribers) wish to contract at lower premiums for one medical service (physicians) without contracting with another (psychologists), I think they have a perfect right so to do, and if they wish to place special trust

Moreover, covering the services of clinical psychologists without the physician supervision requirement would in effect remove the limitation to "medically necessary services" [34] from the health insurance contracts, since clinical psychologists cannot diagnose any physiological cause of a nervous or mental disorder and are not licensed by the Commonwealth of Virginia to do so. Removing a major limitation on coverage from the health insurance contracts would obviously increase the cost of coverage. Thus, a health insurance contract that covered the services of clinical psychologists without the physician supervision requirement inevitably would be more expensive than the coverage actually purchased by McCready's employer.

III. The Decision In VACP Does Not Preclude The Plans From Asserting Their McCarran-Ferguson Act Defense In This Court

McCready argues that the Fourth Circuit's decision in VACP is collateral estoppel against the Plans on their

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in the physicians to approve any other allied medical service, I think they have a perfect right to do that also. The antitrust laws simply are not intended to cover the fact situation at hand.

J.A. 44.

[34] McCready, in footnotes to her brief, inaccurately suggests that the court in *VACP* determined that the physician supervision requirement was not adopted as a means of enforcing the "medically necessary" limitation in the health insurance contract. McCready brief, pp. 5 n.11 and 40 n.126. In fact, the district court in *VACP* found that the physician supervision requirement was adopted for precisely this purpose, 469 F. Supp. at 560-61, and this finding was not disturbed by the Fourth Circuit. *See* 624 F.2d at 485.

McCarran-Ferguson Act defense.[35] The doctrine of collateral estoppel, however, is wholly inapplicable to this case, which comes to this Court on a motion to dismiss under Fed.R.Civ.P. 12(b)(6). It is well established that collateral estoppel does not apply to issues of law.[36] Since this case, arising on a motion to dismiss, presents only issues of law, collateral estoppel is inapplicable.

Even if this case involved questions of proven fact, collateral estoppel would still not apply.[37] In *VACP*, the Richmond Plan moved for a jury trial, which the district court denied. On appeal, the Fourth Circuit reversed (or ignored) the district court's findings of fact in favor of the Plans and ruled that the term of coverage at issue here was not the "business of insurance" under *Group Life & Health Insurance Co.* v. *Royal Drug Co.*,[38] because it did not involve the underwriting of a specific risk.[39] This ruling in *VACP* cannot support collateral estoppel against the Plans under this Court's decision in *Parklane Hosiery Co.* v. *Shore*.[40] In that case, this Court

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[35] McCready brief, pp. 34-37.

[36] F. James, *Civil Procedure*, § 11.22, pp. 583-84 (1965) ("Rulings of law, divorced from the facts to which they are applied, do not become binding upon the parties under principles of res judicata, although they are entitled to weight as legal precedents under the more flexible principles of stare decisis").

[37] The burden of establishing collateral estoppel is on McCready. *Gulf Tampa Drydock Co.* v. *Germanischer Lloyd*, 634 F.2d 874, 878 (5th Cir. 1981); *In re Merrill*, 594 F.2d 1064, 1067 (5th Cir. 1979).

[38] 440 U.S. 205 (1979) (hereinafter cited as *Royal Drug*).

[39] *VACP*, 624 F.2d at 483-84. *VACP* is flatly contrary to *Bartholomew* v. *Virginia Chiropractors Ass'n*, 612 F.2d 812 (4th Cir. 1979), *cert. denied*, 446 U.S. 938 (1980), which was decided only seven months before *VACP*. Judge Warriner, who ruled in favor of the Plans and NSV in the district court in *VACP*, sat by designation on the *Bartholomew* panel and wrote the majority opinion. Judge Hall, who wrote the decision in *VACP*, dissented in *Bartholomew*.

[40] 439 U.S. 322 (1979) (hereinafter cited as *Parklane*).

emphasized that the offensive use of a prior non-jury judgment to bar relitigation of the same issues in a damage action against the same defendants would be permitted *only* where this would be fair to the defendants.

It would be grossly *unfair* to the Plans to allow the offensive use of *VACP*, because the Fourth Circuit reversed careful and specific findings and conclusions by the district court.[41] Indeed, the Fourth Circuit in *VACP* conducted an in-chambers *de novo* appellate trial of the facts. It neither cited nor followed the requirement of Fed.R.Civ.P. 52(a) that, "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Moreover, the Fourth Circuit's finding on the "business of insurance" purported to follow this Court's decision in *Royal Drug*, which was decided *after* the *VACP* trial in the district court. Since *Royal Drug* made the underwriting of risk the primary element in the definition of the "business of insurance," the Plans were denied an opportunity to introduce proof that the term of coverage at issue here constituted the underwriting of risk under *Royal Drug*.

For these reasons, it would not be "fair" under *Parklane* to permit McCready to use *VACP* offensively—indeed, it would be a travesty.

IV. The Plans And NSV Are Entitled To The McCarran-Ferguson Act Exemption

(a) The Term Of Coverage At Issue Here Is "Underwriting" Because It Obviously Affects The Risk Accepted By The Plans

The fallacy in McCready's "business of insurance" argument is shown by the following sentence from her brief:

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[41] The district court in *VACP* found that, "Blue Shield subscriber contract provisions concerning covered treatment for mental and nervous disease are partially exempt from anti-trust scrutiny by the McCarran-Ferguson Act." 469 F. Supp. at 562.

> The Blue Shield Plans decided to underwrite the risk that some of their subscribers would require psychotherapy for treatment of nervous and mental disorders.[42]

This is precisely what the Plans decided *not* to underwrite. The plain words of the health insurance contract (which is reprinted in the Joint Appendix)[43] state that the Plans underwrote the risk that a subscriber would require medically *necessary* treatment by a physician of a nervous or mental disorder. McCready's position can be accepted only by casting aside the health insurance contract.

The Plans and NSV, in their main brief, pointed out that the logical implication of McCready's position is that the risk accepted by the Plans would not have been affected had they contracted to pay for *any* psychotherapy (necessary or not) by "*any* provider, including naturopaths, faith healers and witch doctors."[44] Significantly, McCready did not dispute that this is the logical result of her position.

Moreover, McCready never answered the point that *no* clinical psychologist, regardless of how skilled, is licensed by the Commonwealth of Virginia to diagnose physical diseases that cause psychological disturbances.[45] This is not a matter of fact, or of proof, or of value judgment; it is the law of Virginia. The undeniable conclusion is that a clinical psychologist—no matter how skilled—is simply incapable of determining when psychotherapy is medically necessary and when it is not. McCready's position, if adopted by this Court, would have the effect of eliminating the words "medically necessary" from the

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[42] McCready brief, p. 39.

[43] J.A. 64-76. The relevant provisions are at J.A. 66.

[44] Petitioners' main brief, p. 30 (emphasis in original).

[45] *Compare* Va. Code § 54-273(10) (clinical psychologists) *with* Va. Code § 54-273(3) (medical doctors).

Plans' health insurance contracts. If this is done, the Plans would be assuming the risk, not for just "medically necessary" psychotherapy, but for *any* psychotherapy that a subscriber happened to want and that a clinical psychologist was willing to deliver. To say that this would not increase the risk accepted by the Plans is to engage in fantasy.

(b) Contrary To McCready's Argument, The Mere Use Of The Word "Boycott" In Her Complaint Does Not Automatically Defeat A Motion To Dismiss

In her brief, McCready argues that because her complaint contains the word "boycott," she has *ipso facto* sufficiently alleged a boycott for purposes of § 3(b) of the McCarran-Ferguson Act.[46]

This argument is nonsense. In *St. Paul Fire & Marine Insurance Co.* v. *Barry*,[47] which came to this Court on a motion to dismiss, the complaint expressly alleged a "boycott." Nonetheless, this Court made a full examination of whether the complaint's allegations of fact, if proven, would amount to a "boycott" as a matter of law. Thus, the question here is not whether McCready's complaint contains the word "boycott," but rather whether her allegations of matters of fact, if proven, would amount to a "boycott" within the meaning of § 3(b).

The Plans and NSV, in their main brief, argued that the complaint did not sufficiently allege a boycott, because the Plans are prohibited from competing by a Virginia statute. A boycott requires an agreement between two or more competitors. Boycotts are prohibited by the antitrust laws only because they suppress competition. Unless at least *some* of those participating in a boycott are competitors, the boycott cannot suppress competition.

Surprisingly, McCready relies on *St. Paul* for the proposition that a boycott need not involve any agreement among competitors.[48] The allegations in *St. Paul*, how-

[46] McCready brief, pp. 30-33.

[47] 438 U.S. 531 (1978) (hereinafter cited as *St. Paul*).

[48] McCready brief, p. 43.

ever, presented a classic agreement among horizontal competitors. In contrast, the Plans here are by law specifically prohibited from competing. In selecting a passage from *St. Paul* to quote in her brief, McCready unconsciously illustrates this very distinction:

> A "boycott" within the meaning of the Act has recently and broadly been defined by this Court to include "concerted refusals to deal in cases where the target is *a customer of some or all the conspirators.*" [49]

Of course, for the target to be a customer of *some* of the conspirators, at least *those* conspirators must be competitors of one another. The other cases cited by McCready either do not discuss this point,[50] or, like *St. Paul*, actually involved agreements among competitors.[51] Also, McCready neglects to explain how an agreement among non-competitors could reduce or suppress competition.[52]

Next, McCready retreats to the position that the challenged term of coverage is a "boycott" because the Richmond Plan was merely an "agent" of its member physicians, who compete among themselves and some of whom

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[49] McCready brief, p. 31, *quoting St. Paul*, 438 U.S. at 544 (emphasis added).

[50] *Ballard* v. *Blue Shield of Southern West Virginia, Inc.*, 543 F.2d 1075 (4th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977), *cited in* McCready brief, p. 43 n.138.

[51] *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966), and *Klor's, Inc.* v. *Broadway-Hale Stores Inc.*, 359 U.S. 207 (1959), *cited in* McCready brief, p. 43 n.138. McCready did not discuss *Gough* v. *Rossmoor Corp.*, 585 F.2d 381, 385-88 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979), which is squarely on point. *See Oreck Corp.* v. *Whirlpool Corp.*, 579 F.2d 126 (2d Cir. 1978), *cert. denied*, 439 U.S. 946 (1978).

[52] McCready claims that the Plans compete for "national or federal programs." McCready brief, p. 19 n.58. Suffice it to say that the health insurance contract sold to McCready's employer was not part of any "national or federal programs," and that McCready's complaint contains no allegation that the Plans compete.

compete with clinical psychologists.[53] In support of this idea, McCready relies on *United States* v. *Sealy, Inc.*,[54] which is wholly inapposite. In *Sealy*, this Court held that a corporation that was owned by approximately thirty competitors was a "combination or conspiracy" within the meaning of § 1 of the Sherman Act. The Court emphasized that the owners/competitors exercised actual "day-to-day" control over the affairs of the corporation.[55] The thousands of member physicians of the Richmond Plan, in contrast, exercised only formal, legalistic control by electing some of its directors. Therefore, *Sealy* is not authority for holding the Plans to have been mere "agents" of their member physicians.

Even accepting, *arguendo*, that the Plans are merely "agents," it remains true that each Plan is an economic entity separate from the physicians, and that as separate entities the Plans do not compete with one another and obviously do not compete with psychologists. The term of coverage at issue here was adopted by the Plans in the course of their non-competing insurance businesses. Thus, the term of coverage was not agreed to among competitors and is not a boycott.

To characterize a term of coverage in an insurance contract as a "boycott" within the meaning of § 3(b) of the McCarran-Ferguson Act would entirely eviscerate the exemption provided by that statute. For example, no health insurance contract covers the services of faith healers, but it would be stretching the word "boycott" beyond recognition to say that faith healers are the target of a boycott. Similarly, it cannot be said here that the coverage of psychologists' services only under certain conditions amounts to a boycott. Certainly none of this Court's decisions support such a characterization. Therefore, the term

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[53] McCready brief, p. 43. The Roanoke Plan has no members, and its participating physicians lack even formal control.

[54] 388 U.S. 350 (1967) (hereinafter cited as *Sealy*).

[55] *Sealy*, 388 U.S. at 353.

of coverage at issue here is not a boycott within the meaning of § 3(b) of the McCarran-Ferguson Act.[56]

CONCLUSION

For the reasons expressed in their main brief and in this reply brief, the Plans and NSV respectfully request this Court to reverse the decision of the Fourth Circuit below and to dismiss McCready's complaint.

Respectfully submitted,

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[56] Two make-weight arguments put forward by McCready are that the term of coverage at issue here is not "regulated by State law," and that the Plans are not insurance companies. The answers are brief: Since the Bureau of Insurance brought an administrative action against the Richmond Plan in 1977 to challenge the validity of this term of coverage, it seems obvious that the "regulated by State law" test is satisfied. McCready consistently neglects to point out that the Richmond Plan ultimately *prevailed* in this action for the period 1973 to 1979. *Blue Cross of Virginia* v. *Commonwealth*, 221 Va. 349, 269 S.E.2d 827 (1980).

The McCarran-Ferguson exemption applies *not* to insurance companies, but rather to the "business of insurance." Whether the Plans are insurance companies, therefore, is irrelevant. The important point is that the Plans' health insurance contracts are part of the underwriting and spreading of risk. *Royal Drug*, 449 U.S. at 230 n.37.

Amicus Brief

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No. 81-225

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

BLUE SHIELD OF VIRGINIA,
BLUE SHIELD OF SOUTHWESTERN VIRGINIA
and
NEUROPSYCHIATRIC SOCIETY OF VIRGINIA, INC.,
Petitioners,
v.
CAROL MCCREADY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 36.3 of the the Rules of this Court, the American Psychological Association hereby moves for leave to file the attached brief *amicus curiae* in the above case.

The reasons supporting the granting of this motion and the issues which *amicus* is uniquely qualified to address are set forth in the statement of interest of *amicus* and in the attached brief. The brief will be of value to the Court in its deliberations, and will contain material not otherwise presented.

Respondent has consented to the filing of this brief, and her letter is being filed with the clerk of this Court. Consent for filing was requested of petitioners, but has been denied. When the related case of *Virginia Academy of Clinical Psychologists v. Blue Shield of Va.*, 624 F.2d 476 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) was before the Fourth Circuit, the American Psychological Association sought consent from the parties to participate as *amicus*. But such permission was denied by appellees (who are petitioners in the instant case). The United States Court of Appeals for the Fourth Circuit, however, recognized that *amicus* has important expertise and information to contribute and granted the American Psychological Association's motion to participate as *amicus curiae*.

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INTEREST OF *AMICUS CURIAE*

The American Psychological Association (APA), a nonprofit scientific and professional organization founded in 1892, is the major association of psychologists in the United States. The APA has more than 52,000 members —1,227 in Virginia—and includes the vast majority of psychologists holding doctoral degrees from accredited universities in the United States. The purpose of the APA, as set forth in its bylaws, is to "advance psychology as a science and profession, and as a means of promoting human welfare by the encouragement of psychology in all branches in the broadest and most liberal manner." A substantial and growing number of APA's member psychologists are health-care providers licensed to provide mental health services to individual clients.

Since 1948, one of APA's major functions has been to accredit doctoral programs in professional psychology. Another of APA's central functions is to establish ethical standards and guidelines for the delivery of psychological services. The *Ethical Principles* of psychologists have been incorporated in the laws of most states, thus governing the professional conduct of psychologists licensed in those states.

APA has undertaken several recent projects described in this brief which have assisted the public and other interested institutions in identifying qualified practitioners. And in order to provide consumers and third-party payers with a formal but readily accessible avenue of redress should a question arise regarding services or fees, APA has actively participated in the establishment of peer review programs on a nation-wide basis.

APA has long been active in the effort to improve and upgrade mental health care delivery in the United States, and it is the vitality of a competitive and cost-effective service delivery system which lies at the heart of this case. For the reasons set forth in this brief, *amicus* believes that the judgment of the appellate court, if

affirmed, will ensure fair price competition in an open market for mental health services and will improve the delivery to consumers of such badly needed services at a reasonable price.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent is a subscriber to a pre-paid health plan who required services for mental and emotional disorders.[1] Mental and emotional disorders afflict more Americans than any other category of disabling condition. According to the 1978 Report of the President's Commission on Mental Health, at least 15 percent of the population—approximately 33 million people—require some form of professional mental health treatment at any given time. But as the Commission found, the mental health field is plagued by a shortage of personnel trained to deliver these much needed services.[2]

Psychologists are fully trained and qualified to provide psychotherapeutic mental health services, which studies have shown to be effective in curing or ameliorating mental and emotional disorders. Indeed, no other mental health profession—psychiatry included—requires of all its practitioners as high a degree of education and training specifically in mental and emotional processes as does the profession of psychology. Generally, a doctoral level program in clinical psychology requires four to five years of rigorous and extensive didactic and field placement experience. Additional assurance that mental health services by psychologists will be of high quality is provided by licensure and certification statutes regulating the practice of psychology in all 50 states and the District of Columbia, by the APA's ethical principles and professional

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[1] Respondent brought this case as a class action. But no ruling on that issue has occurred because the District Court granted petitioners' motion to dismiss for lack of standing.

[2] 1 PRESIDENT'S COMMISSION ON MENTAL HEALTH, REPORT TO THE PRESIDENT 2-10 (1978). [PRESIDENT'S COMMISSION REPORT]

standards, and by a nation-wide system of professional standards review committees.

Recognition of psychology as an independent profession on a co-equal footing with psychiatry is expressed in such major federal statutes as the Federal Employees Health Benefits Act and the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS). These and many other federal statutes require direct recognition of clinical psychologists as independent health-care providers, *i.e.*, as health professionals qualified to deliver services without mandatory referral or supervision by a physician. Moreover, 30 states and the District of Columbia, representing more than 80 percent of the American population, have enacted laws establishing the direct recognition of psychological services for reimbursement purposes ("freedom of choice" laws). (Point I)

Physicians have strenuously opposed recognition of psychologists as independent health-care providers and view the economic competition posed by psychologists as threatening. Their opposition is evidenced both in official publications by organized psychiatry and in the statements of individual psychiatrists. Blue Shield of Virginia, like other Blue Shield plans, has historically had a policy of "control by the medical profession," which has been critized both by Congress and by the Federal Trade Commission's Bureau of Competition. As the Fourth Circuit observed, petitioners were motivated by a wish to stamp out free competition for psychotherapy services and to preserve as much as possible their domination and control of the market. (Point II)

In the circumstances of this case, respondent and other consumers have standing to assert antitrust violations which diminish their property by increasing the net cost of psychotherapeutic mental health services. The treble-damages provision of the Clayton Act was intended by Congress primarly as a remedy for individuals, "especially consumers." *Brunswick Corp. v. Pueblo Bowl-O-*

Mat, Inc., 429 U.S. 477, 486 n.10 (1977). Moreover, as this Court unanimously ruled in *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), a consumer whose money has been diminished by reason of an antitrust violation has been injured in his property within the meaning of Section 4 of the Clayton Act, even if that consumer has suffered no business or commercial injury. The private treble-damages remedy was enacted to achieve two major objectives—compensation for private harm and enforcement of the national economic policy in favor of competition. Both of these Congressional objectives would be furthered by allowing consumers standing in a case such as this. And because the injuries to psychologists and to consumers of psychological services are quite distinct, compensation for the private harm done consumers can be furthered *only* by allowing consumer standing. Recognition of respondent's standing in this case will also advance the important societal objective of ensuring the delivery of psychological services at a reasonable and affordable cost. (Point III-A)

None of the specific reasons for denying standing raised by petitioners in this case hold up under scrutiny. First, because the economic injury to psychologists and consumers is quite distinct, granting standing to both will not result in the multiple or duplicative recoveries prohibited by *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). Second, recognition of respondent's standing is not inconsistent with the decision of this Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) because in that case this court expressly did "not address the standing issue . . . ." *Id.* at 728 n.7. Third, petitioners' assertion that respondent's alleged injury results from the independent decision of her employer to purchase a group contract that did not cover psychologists' services is legally irrelevant and factually erroneous. Finally, *amicus* is puzzled by petitioners' contention that the "target area" rule "was rejected by the majority" below. Far from rejecting the rule, the majority squarely

held that both psychologists *and* consumers "were in the target area." *McCready v. Blue Shield of Va.*, 649 F.2d 228, 231 (4th Cir. 1981). (Point III-B)

I. PSYCHOLOGISTS ARE FULLY TRAINED AND QUALIFIED TO PROVIDE PSYCHOTHERAPEUTIC MENTAL HEALTH SERVICES

A. The Nature of Services Required by Mentally and Emotionally Disturbed Persons

Ms. McCready, the respondent in this case, seeks to represent a class of persons who are subscribers to Blue Shield's prepaid health plan and who are in need of services for mental and emotional disorders including but not limited to depression, anxiety, drug use problems, alcohol-related disorders, phobias, obsessive-compulsive behavior, hysterical symptoms, schizophrenia, and psychosomatic conditions.[3]

As a Task Panel of the President's Commission on Mental Health recently noted, "the burden of mental illness in the United States is very large and probably constitutes our primary public health issue. For the past few years, the most commonly used estimate is that at any one time, 10 percent of the population needs some form of mental health care . . . . There is new evidence that this figure may be closer to 15 percent of the population."[4] According to the National Institute of Mental Health, Division of Biometry and Epidemiology, direct expenditures for treatment of psychological and emotional disorders are $17 billion a year, which represents

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[3] 2 PRESIDENT'S COMMISSION REPORT, *supra* note 2, at 4-8; GARFIELD & BERGIN, HANDBOOK OF PSYCHOTHERAPY AND BEHAVIOR CHANGE: AN EMPIRICAL ANALYSIS 3 (2d ed. 1978).

[4] 2 PRESIDENT'S COMMISSION REPORT, *supra* note 2, at 4.

about 11 percent of all health care expenditures nationally.[5]

Psychotherapy, which can be informally defined as "an interpersonal process designed to bring about modifications of feelings, cognitions, attitudes and behavior which have proven troublesome" [6] has been repeatedly established as efficacious in curing or ameliorating such conditions.[7] Psychological services have also proved valuable in treating the emotional aspects of many health conditions previously viewed as purely "physical" or "medical" in nature. For example, psychological principles have been successfully applied in the assessment and treatment of such conditions as tension (heart disease, ulcers), addiction (alcohol, drugs), and chronic pain.[8] Additionally, psychological techniques are being used for such purposes as physical rehabilitation of stroke victims, correction of curvature of the spine, controlling asthma attacks, and decreasing the risks associated with surgery.[9]

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[5] *Id.*

[6] GARFIELD & BERGIN, *supra* note 3.

[7] *E.g.*, OFFICE OF TECHNOLOGY ASSESSMENT, UNITED STATES CONGRESS, BACKGROUND PAPER NO. 3: THE EFFICACY AND COST EFFECTIVENESS OF PSYCHOTHERAPY, 37-47 (1980); SMITH, GLASS & MILLER, THE BENEFITS OF PSYCHOTHERAPY (1980); Bergin & Lambert, *The Evaluation of Therapeutic Outcomes*, in GARFIELD & BERGIN, *supra* note 3, at 139; Smith & Glass, *Meta-Analysis of Psychotherapy Outcome Studies*, 32 AMERICAN PSYCHOLOGIST 752 (1977); *See generally* GARFIELD & BERGIN, *supra* note 3.

[8] *E.g.*, Olbrisch, *Psychotherapeutic Intervention in Physical Health: Effectiveness and Economic Efficiency*, 32 AMERICAN PSYCHOLOGIST 761 (1977); Kellner, *Psychotherapy in Psychosomatic Disorders*, 32 ARCH. GEN. PSYCHIATRY 1021 (1975); EMRICK, *A Review of Psychologically Oriented Treatment of Alcoholism*, 36 JOURNAL OF STUDIES ON ALCOHOL 88 (1975).

[9] *See generally*, STONE, COHEN & ADLER, HEALTH PSYCHOLOGY (1979).

The interdependence between mental and physical health has been recognized even in traditional medicine for some time.[10] Mental health is increasingly viewed as a necessary component of overall human health, and health care planners are acknowledging the role that psychology plays in decreasing the need for medical services by improving the physical and mental well-being of individuals afflicted with many diseases and disabilities.[11]

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[10] *See generally* Kaufman, *Psychiatric Findings in Admission to a Medical Service in a General Hospital*, 26 JOURNAL OF THE MOUNT SINAI HOSPITAL 160 (1959); Kellner, *Psychiatric Ill Health Following Physical Illness*, 112 BRITISH JOURNAL OF PSYCHIATRY 71 (1966); Nigro, *A Psychiatrist's Experiences in General Practice in a Hospital Emergency Room*, 214 JOURNAL OF THE AMERICAN MEDICAL ASOCIATION 1657 (1970).

[11] It has been repeatedly demonstrated that psychological intervention lowers the cost of medical services and eases the load on our overburdened medical facilities. Studies have consistently shown that emotionally distressed individuals are unnecessarily heavy users of general health services, and that significant declines in the use of those services occurred when such persons received psychological services. *E.g.*, Jones & Vischi, *Impact of Alcohol, Drug Abuse and Mental Health Treatment on Medical Care Utilization: A Review of the Research Literature*, 17 MEDICAL CARE 1 (Dec. 1979); Cummings & VandenBos, *The Twenty Year Kaiser-Permanente Experience with Psychotherapy and Medical Utilization: Implications for National Health Policy and National Health Insurance*, 1 HEALTH POLICY QUARTERLY 159 (1981); Rosen & Wiens, *Changes in Medical Problems and Use of Medical Services Following Psychological Intervention*, 34 AMERICAN PSYCHOLOGIST 240 (1979); Cummings & Follette, *Brief Psychotherapy and Medical Utilization* in DORKIN, THE PROFESSIONAL PSYCHOLOGIST TODAY: NEW DEVELOPMENTS IN LAW, HEALTH, INSURANCE AND HEALTH PRACTICE (1976); Goldberg *et al.*, *Effect of Short-term Outpatient Psychiatric Therapy Benefit on the Utilization of Medical Services in a Prepaid Group Practice Medical Program*, 8 MEDICAL CARE 419 (1970).

B. Qualifications of Psychologists to Provide Mental Health Services

Since the last century, psychology and psychologists have figured prominently in research and teaching concerning mental, emotional and behavioral processes. Psychology is the scientific study of behavior and experience and the application of what is learned by that study to human problems. The practice of psychology has been defined as the rendering of services involving the application of principles, methods and procedures of understanding, predicting and influencing behavior, including diagnosis, prevention, treatment and amelioration of psychological problems and emotional disorders.[12] Psychologists, by virtue of their training and experience, are recognized as fully qualified to diagnose and provide psychotherapeutic treatment for mental disorders.

1. *The Doctoral Degree*

Generally, a doctoral level program in clinical psychology requires four to five years of rigorous and extensive didactic and field placement experience, with approximately three years devoted to coursework, one year to a full time supervised internship at a clinic, hospital or other training center, and one year of dissertation research. The basic training model of doctoral programs in clinical psychology is the scientist-professional model, i.e., the teaching of the basic science and methods of psychology combined with the theory and techniques of clinical intervention.[13] By way of contrast, physicians are not required to have any training specifically related to mental or emotional disorders in order to call themselves psychiatrists and practice psychiatry—all they need is

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[12] *See* Cal. Bus. & Prof. Code Ann. § 2903 (Supp. 1981); Va. Code Ann. § 54-936(c)(d) (1978).

[13] *See generally* AMERICAN PSYCHOLOGICAL ASSOCIATION, CRITERIA FOR ACCREDITATION OF DOCTORAL TRAINING PROGRAMS AND INTERNSHIPS (January 1979).

an M.D. degree.[14] Moreover, the basic medical education includes only very limited coursework or clinical experience with mentally or emotionally disordered persons.

2. *Licensure and Certification*

At present, all 50 states and the District of Columbia have enacted laws regulating the practice of psychology.[15] These are either certification or licensure laws; certification laws limit the use of the title "psychologist" while licensing laws regulate the use of the title and also define the scope of those activities for which a license to practice is required. Most state psychology laws establish the doctoral degree in a field of study primarily psychological in nature plus two years of supervised experience as the minimum requirement for licensure or certification. State examining boards administering laws regulating the practice of psychology also require that applicants pass an examination, either written, oral or both. Most state boards employ a standardized written test developed by the Professional Examination Service in conjunction with the American Association of State Psychology Boards.

Ordinarily, psychology licensure is generic. That is, certificates or licenses issued by statutorily constituted examining boards refer to "psychology" and to "psychologists," not to any specialty grouping within the profession.[16]

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[14] Sobel, *Freud's Fragmented Legacy*, New York Times, October 26, 1980 (magazine) at 102.

[15] LAHMAN, LICENSURE REQUIREMENTS FOR PSYCHOLOGISTS: USA AND CANADA (1978).

[16] To give consumers, third-party payers, and government planners a clear idea of which generically licensed or certified psychologists are specially trained and qualified to render health services, the *National Register of Health Service Providers in Psychology* was established in 1975. Approximately 13,000 providers

3. *Ethical Codes and Professional Standards*

To further ensure a high quality of professional practice, the states have adopted ethical codes identical or quite similar to the APA's *Ethical Principles of Psychologists.*[17] The *Ethical Principles* deals with a variety of professional and scientific issues such as confidentiality, utilization of assessment techniques, consumer welfare and professional relationships. The *Ethical Principles* also mandates that psychologists practice only within their areas of expertise and specifically states that the psychologist is to seek consultation when necessary.

In 1977 the APA Council of Representatives (the Association's policy making body) adopted a set of generic *Standards for Providers of Psychological Services,*[18] which specify minimally acceptable levels of performance for psychologists engaged in providing services.

The generic *Standards for Providers* are now supplemented by *Specialty Guidelines*[19] for clinical, counseling, industrial/organizational, and school psychology, adopted in 1980. These four areas constitute the principal fields of specialization in applied psychology.

4. *Peer Review*

Still another quality control mechanism which operates with respect to psychologists is peer review. As encouraged by the American Psychological Association, each

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are listed in the most current edition of the *National Register*. The *Register* has been recognized as identifying qualified providers by the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), the Aetna and Blue Cross/Blue Shield Federal Employees Health Benefits Plans and other groups.

[17] APA, *Ethical Principles of Psychologists*, 36 AMERICAN PSYCHOLOGIST 633 (1981) *See e.g.*, Md. Code Ann. art. 43, § 627 (1980); Regulations of Virginia Board of Psychology § V, POR 5.1 (1979).

[18] APA, *Standards of Providers of Psychological Services*, 32 AMERICAN PSYCHOLOGIST 495 (1977).

[19] APA, *Specialty Guidelines for the Delivery of Services by Clinical Psychologists*, 36 AMERICAN PSYCHOLOGIST 640 (1981).

APA-affiliated state psychological association has established a Professional Standards Review Committee (PSRC) to provide consumers and third-party payers with a formal but readily accessible avenue of redress should a question arise regarding the customary, usual, and reasonable nature of any fee or service rendered. PSRC determinations are advisory in nature, and are based upon regional standards of practice as perceived by psychologist peers. The APA Committee on Professional Standards, which coordinates PSRC review activity nationwide, is also encouraging psychology's involvement in the implementation of the federal peer review and quality assurance program known as "PSRO." [20]

C. Recognition of Psychology as an Independent Profession

Given their intensive training, the rigorous licensure/certification and ethical standards, and peer review, all of which ensure the quality of their work, it is not surprising

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[20] Another development in the area of quality assurance and peer review is the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) Peer Review Project. Under contract to CHAMPUS, a panel of psychologist consultants has engineered a system for retrospective review of claims for services provided to CHAMPUS beneficiaries to ensure that the services are appropriate and of high quality. The CHAMPUS Program, which provides health coverage for military dependents, military retirees, and some others, represents the largest unified group health plan in the country. Under the processing system which is now in operation, claims failing to meet the screening criteria developed by the CHAMPUS Project Panel of psychologists are subjected to "third-level" review by teams of local psychologists.

Claims screening systems drawing upon the experience of the APA CHAMPUS Project have been established by the APA in conjunction with the Aetna Life and Casualty, Provident Mutual and Prudential Insurance Companies.

that psychologists are viewed as leaders among mental health-care professionals. Recognition of psychology as an independent profession providing psychotherapy on a co-equal footing with psychiatry is expressed not only in public attitudes but also in federal and state statutory and regulatory law and in private sector practices.

Most relevant federal statutes require direct recognition of clinical psychologists as independent health-care providers, *i.e.*, as persons qualified to deliver services without mandatory referral or supervision by a physician.[21] Two notable examples of such statutes are the Federal Employees Health Benefits Program,[22] which covers approximately 10 million federal workers and their beneficiaries, and the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS),[23] which covers both inpatient and outpatient services for approximately 7 million dependents of military personnel, retired military personnel, and other beneficiaries. In its 1978 report, The President's Commission on Mental Health recommended independent status for clinical psychologists under Medicare and under any future national health insurance program.[24]

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[21] *E.g.*, Federal Employees Compensation Act, 5 U.S.C. § 8101(2) (1976); Vocational Rehabilitation Act, 29 U.S.C. § 723(a)(1) (1976); Health Maintenance Organization Act, 42 U.S.C. § 300e-1 (1976); 42 C.F.R. §§ 110.101, 110.104 (1980); Disaster Relief Act, 42 U.S.C. § 5183 (1976); 42 C.F.R. § 38.2(e) (1980); Veterans Health Care Expansion Act, 38 U.S.C. § 613(b) (1976); Comprehensive Employment and Training Act, 29 U.S.C. §§ 801 *et seq.* (1976); 29 C.F.R. § 94.4(bb) (1978).

[22] 5 U.S.C. § 8902(k) (1976).

[23] 10 U.S.C. §§ 1071 *et seq.* (1976); 32 C.F.R. § 199.12(c)(3)(iii)(a) (1981).

[24] 1 PRESIDENT'S COMMISSION REPORT, *supra* note 2, at 29-30.

Thirty states and the District of Columbia, representing more than 80 percent of the American population, have enacted laws establishing the direct recognition of psychological services for reimbursement purposes.[25] In effect, these laws allow consumers a "freedom of choice" among state licensed practitioners.[26] The Health Insurance Association of America, which represents more than 300 insurance companies that write approximately 80 percent of all health insurance contracts issued by United States companies, formally supports the introduction of such "freedom of choice" legislation in the remaining states and has endorsed a model statute.

In addition to "freedom of choice" legislation, many other state statutes recognize the expertise of psychologists in such areas as civil commitment proceedings,[27] participation in rehabilitation programs for convicts,[28] forensic examinations of criminal defendants,[29] service on community services boards,[30] and reports on incidents of child abuse.[31] A majority of the states provide that

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[25] American Psychological Association State Association Bulletin, App. 4 (1982) (unpublished monograph in American Psychological Association Professional Affairs Office).

[26] *E.g.*, Ark. Stat. Ann. § 66-3212.6 (1980); Md. Code Ann. art. 48A, § 490A (Cumm. Supp. 1981); Miss. Code Ann. § 83-41-211 (Cumm. Supp. 1981); N.Y. Ins. Law §§ 164.7-d, 221.5(e), 250.1 (Supp. 1981); Tenn. Code Ann. § 56-7-108 (1980); Va. Code Ann. §§ 38.1-824, 38.1-347.1 (Cumm. Supp. 1979).

[27] *E.g.*, Va. Code Ann. § 37.1-65.1C2 (Cumm. Supp. 1981).

[28] *E.g.*, Md. Code Ann. art. 31B, § 5 (Cumm. Supp. 1980).

[29] *E.g.*, Ohio Rev. Code Ann. § 2947.06 (1975).

[30] *E.g.*, N.Y. Mental Hygiene Law § 41.11 (1978).

[31] *E.g.*, Del. Code Ann., tit. 16, §§ 902, 903 (1974 & Cumm. Supp. 1980).

communications between psychologists and their clients are privileged,[32] and numerous federal and state courts have recognized the competence of clinical psychologists to testify as expert witnesses in the field of mental disorders.[33]

These facts are consistent with the holding of the Fourth Circuit that clinical psychologists are equally qualified to provide mental health services and that under ordinary circumstances they compete with psychiatrists in the marketplace for the delivery of such services:

> The record demonstrates that psychologists and psychiatrists do compete; indeed it is susceptible to judicial notice. Both provide psychotherapy, 469 F.Supp. at 560, and are licensed to do so by state law. *See* Va. Code §§ 54-273(10), -274, -309.1, -936 (1978 Replacement Vol.) Competition in the health care market between psychologists and M.D. providers of psychotherapy is encouraged by the legislature, *see* Va. Code § 38.1-824, and its existence is well documented. *Virginia Academy of Clinical Psychologists v. Blue Shield of Va.*, 624 F.2d 476, 485 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981) (footnote omitted) (incorporated by reference in *McCready v. Blue Shield of Va.*, 649 F.2d 228, 230 (4th Cir. 1981)).

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[32] *E.g.*, Ky. Rev. Stat. Ann. § 319.111 (1977); Tenn. Code Ann. § 63-1117 (1976); Va. Code Ann. § 8.01-399 (1977). *See also* Rule 501, Fed. R. Evid.

[33] *E.g.*, *United States v. Riggleman*, 411 F.2d 1190, 1191 (4th Cir. 1969); *United States v. Brawner*, 471 F.2d 969, 994 (D.C.Cir. 1972) (*en banc*); *United States v. Portis*, 542 F.2d 414, 419 (7th Cir. 1976); *Hogan v. State*, 496 S.W.2d 594, 597 (Tex. Crim.), *cert. denied*, 414 U.S. 862 (1973); *Rollins v. Commonwealth*, 207 Va. 575, 580, 151 S.E.2d 622, 626 (1966), *cert. denied*, 386 U.S. 1026 (1967); *Roberts v. State*, 41 Wis.2d 537, 551, 164 N.W.2d 525, 532 (1969). *See also* Rule 702, Fed. R. Evid.

II. PHYSICIANS AND BLUE SHIELD PLANS HAVE HISTORICALLY MADE AND CONTINUE TO MAKE ATTEMPTS TO DISCOURAGE COMPETITION FROM PSYCHOLOGISTS AND OTHER QUALIFIED PROVIDERS OF MENTAL HEALTH SERVICES, AND HAVE THEREBY INCREASED THE COST TO THE CONSUMERS OF SUCH SERVICES

A. Anti-competitive Policies of Psychiatry

Recognition of psychologists as independent health care providers has met with strenuous opposition from physicians in general and psychiatrists in particular. Psychiatrists view their "territory" as being "assailed from every side" by psychologists and view the economic competition as threatening.[34]

The oft-stated policy of the American Psychiatric Association is to do everything possible to keep psychologists and other professionals in a subordinate role under the direction of physicians/psychiatrists.[35] The likely result of allowing psychiatrists to determine which competing psychotherapists will be reimbursed is indicated in an American Medical News article noting that "psychiatrists are declaring war on anyone trying to move in on their territory . . . [i]n the fight for professional

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[34] *Province of Psychiatry Questioned, Said to Need Defining,* Clinical Psychiatry News, November 1977, at 1.

[35] *E.g., Position Statement on Hospital Privileges for Psychologists,* 128 AMERICAN JOURNAL OF PSYCHIATRY 1456 (1971); *Position Statement on Psychiatrists' Relationship with Non-Medical Mental Health Professionals,* 130 AMERICAN JOURNAL OF PSYCHIATRY 386 (1973); *Principles of Medical Ethics with Annotations Especially Applicable to Psychiatry,* 130 AMERICAN JOURNAL OF PSYCHIATRY 1058 (1973); *Position Statement on Administration of Psychiatric Facilities,* 133 AMERICAN JOURNAL OF PSYCHIATRY 604 (1976); *see also Guidelines of Psychiatrists in Consultative, Supervisory, or Collaborative Relationships with Nonmedical Therapists,* 137 AMERICAN JOURNAL OF PSYCHIATRY 1489-90 (1980).

survival. . . ." [36] The president of the American Psychiatric Association is quoted in the same article as suggesting that psychiatrists should "push for treatment supremacy over allied health professionals practicing in the mental health field." [37]

One example of this effort is the attempted "remedicalization" of psychiatry, *i.e.*, an attempt to define all treatment of mental health problems as "medical" treatments.[38] An official of the American Psychiatric Association has described the effects of the process as follows:

> Medical care becomes equated with health care. This brings psychiatry back into the mainstream of the medical establishment, because the equation of medical care with health care is the basis on which organized medicine claims the right to exert control over the total health-care industry.[39]

B. Anti-competitive Policies of Blue Shield

This policy of "control by the medical profession" has long been the policy of Blue Shield of Virginia as well. Indeed, Blue Shield grew out of "medical service bureaus" organized by county medical societies to combat plans developed by employers to deliver medical care to their employees on a contract basis. The direct ancestors

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[36] *Psychiatry Faces Survival Battle, Threats to Profession Seen*, May 26, 1978 at 1, col. 1.

[37] *Id.* at col. 2.

[38] For example, the fourth edition of A PSYCHIATRIC GLOSSARY (AMERICAN PSYCHIATRIC ASSOCIATION 1974) introduced a new term, "medical psychotherapy." Advertising material emphasized that this "new definition will be helpful to psychiatrists in relation to the third-party payment problem."

[39] *Tenson Rising Between Psychology, Psychiatry*, Clinical Psychiatry News, November 1977, at 1 (summarizing remarks of director of membership services and studies division of American Psychiatric Association).

of the present Blue Shield plan were established in the 1940s, offering prepaid coverage through medical societies and other physician-controlled organizations.[40] And as early as 1947, the medical profession's control over Blue Shield plans was being criticized, particularly because of the impact of that control on physicians' fees.[41]

Today, Blue Shield plans comprise by far the nation's largest source of private third-party payments for health services. During 1977, Blue Shield plans underwrote or administered coverage for approximately 85.3 million Americans, or about 39.5 percent of the nation's total population.[42] Physician dominance of Blue Shield has continued, as medical societies and other physician organizations "participate extensively in the control of most Blue Shield plans."[43] Many Blue Shield plans continue to act on the premise that physician organizations should control all aspects of health care, including the services of non-physicians.[44]

Although many Blue Shield plans extended coverage for mental health services in the 1960s, some—particularly in areas with high concentrations of psychiatrists—refused to recognize and reimburse clinical psychologists as independent providers, even though psychologists were

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[40] FEDERAL TRADE COMMISSION, MEDICAL PARTICIPATION IN CONTROL OF BLUE SHIELD AND CERTAIN OTHER OPEN-PANEL MEDICAL PRE-PAYMENT PLANS 54-60 (1979) [FTC BUREAU OF COMPETITION].

[41] REED, BLUE CROSS AND MEDICAL SERVICES PLANS 236 (1947). For more recent criticism, *see* KENNEDY, IN CRITICAL CONDITION: THE CRISIS IN AMERICA'S HEALTH CARE 210 (1972).

[42] FTC BUREAU OF COMPETITION, *supra* note 40, at 80, quoting Blue Cross/Blue Shield Fact Book 1978, at 16.

[43] *Id.* at 87.

[44] *Id.* at 159.

licensed to practice independently in most states.[45] On the national level, Blue Shield refused to afford psychologists independent status in its program for federal employees until Congress mandated coverage for psychologists' services in 1974.[46] As explained in a staff report to the Federal Trade Commission, one of the

> ". . . important decisions each Blue Shield plan must make in carrying on its business is determining which providers it will pay for supplying covered services to its subscribers. The decision as to which providers are eligible to receive reimbursement has a significant impact on competition in the health care services market. To the extent that providers' services are not covered by Blue Shield contracts, those providers may be virtually eliminated as competitors in the portion of the market represented by Blue Shield subscribers. If the plan in question has a substantial market share, such providers may in fact be seriously hampered in competing in the market as a whole." [47]

As a consequence of these decisions, "effective competition" from licensed non-physician health providers has been delayed and obstructed. Some professions have been excluded; others have been kept in a "complementary" or "physician-support" status, although their authority to practice independently has been recognized by state law.[48]

Such anti-competitive attitudes and practices are at issue in this case. As the court found in the companion

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[45] *Id.* at 163.

[46] 5 U.S.C. § 8902(k) (1976). *See* S.REP. No. 93-961, 93d Cong., 2d Sess. 3 (1974) ("no justification" for requiring supervision of psychologists by physicians).

[47] FTC BUREAU OF COMPETITION, *supra* note 40, at 210-211. *See also* FEDERAL TRADE COMMISSION, ENFORCEMENT POLICY WITH RESPECT TO PHYSICIAN AGREEMENTS TO CONTROL MEDICAL PREPAYMENT PLANS (September 25, 1981).

[48] FTC BUREAU OF COMPETITION, *supra* note 40, at 161-162.

case *Virginia Academy of Clinical Psychologists v. Blue Shield of Va.*, 624 F.2d 476, 485 n.11 (4th Cir. 1980), "one could scarcely find a more revealing statement of competitive conditions than the statement of [the medical director of the Richmond plan] concerning the need to stop 'encroachment' by non-M.D. providers of therapy." That statement appeared in the May 25, 1972 minutes of the Committee on Mental Health of the Medical Society of Virginia, which read as follows:

> Dr. Hulley assured the Committee of the interest of Blue Cross/Blue Shield where psychiatric services are concerned and discussed a report prepared under the direction of Dr. Wingfield and a special committee of the Neuropsychiatric Society.
>
> The report is concerned with services provided by psychiatrists and charges involved. It has been referred to the Blue Shield Board for consideration and final disposition.
>
> It was brought out that a number of groups, which have a part in the overall mental health picture, are little-by-little working their way into the therapy field. It seemed to be the consensus that the Medical Society of Virginia should take a firm stand on this encroachment and seek to stop it once and for all.
>
> It was brought out that psychotherapy apparently means different things to different people and it was agreed that it should be defined as that performed by psychiatrists or under the direct supervision of psychiatrists. 624 F.2d at 481 n.6.

That evidence, which is incorporated by reference into the Fourth Circuit's decision in this case (649 F.2d at 230), shows with shocking clarity the extent to which petitioners were motivated by a wish to stamp out free competition in the marketplace for psychotherapy services and to preserve as much as possible their domination and control of the field.

C. The Effects of Such Illegal Practices on the Cost of Services to Consumers

The elimination of psychologists and other non-physician providers from the marketplace of mental health services leads inevitably to higher costs for such services.[49] And from a cost perspective, the requirement that psychologists bill through physicians is little better than the practice of excluding psychologists from the market entirely. As a Senate committee has concluded, "there is little if any benefit derived from the practice of [physician] supervision of [mental health] service other than the earning of money by doctors of medicine . . ."[50]

When such anti-competitive practices as have been alleged here and proved in the companion case are allowed to persist, the real victims are persons such as respondent and the class she seeks to represent who must pay artificially high prices for artificially scarce mental health services. Persons in need may even be denied such services entirely because the existing supply of qualified psychotherapists will be grossly inadequate if non-physician providers have been driven from the marketplace.

Noting that "[t]he Blue Shield plans are a dominant source of health care coverage in Virginia" and that "[t]heir decisions as to who will be paid for psychotherapy necessarily dictate, to some extent, which practitioners will be chosen from among those competent under the law to provide such services," the Fourth Circuit found the plans' requirement that psychologists' fees be billed through physicians to be illegal. *Virginia Academy of Clinical Psychologists v. Blue Shield of Va.*, 624 F.2d 476, 485 (4th Cir. 1980). "The Blue Shield policy forces the two independent economic entities to act as

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[49] Frank, *Pricing and Location of Physician Services in Mental Health*, 1 HEALTH POLICY QUARTERLY 3 (1982) (in press).

[50] S.REP. No. 92-861, 92d Cong., 2d Sess. 5 (1972). *See also* S.REP. No. 93-961, 93d Cong., 2d Sess. (1974).

one, with the necessary result of diminished competition in the health care field." *Id.* As the Fourth Circuit held, the elimination of the bill-through-provision would *not* preclude a variety of other cost control and quality control measures by Blue Shield. But it would "expand consumer and provider alternatives" and would be likely to "result in lower costs." *Id.* at 486.

III. IN THE CIRCUMSTANCES OF THIS CASE, RESPONDENT AND OTHER CONSUMERS HAVE STANDING TO ASSERT ANTITRUST VIOLATIONS WHICH DIMINISH THEIR PROPERTY BY INCREASING THE NET COST OF PSYCHOTHERAPEUTIC MENTAL HEALTH SERVICES

It is undisputed that respondent and other consumers of psychological services have standing, in the constitutional sense, to assert antitrust violations which diminish their property by increasing the net cost of such services.[51] The question, therefore, is not whether Congress has the power to confer standing in these circumstances, but whether it has done so. In *amicus'* view, Congress manifestly intended for consumers to have standing in cases such as this.

A. Standing Will Further the Purposes Underlying the Antitrust Laws and Will Ensure the Delivery of Necessary Psychological Services at Reasonable Cost

Several important points relating to consumer standing are by now well-settled. First, as this Court unanimously ruled in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977), the treble-damages

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[51] *See* Berger and Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809, 813 n.11 (1977); and Comment, *Closing the Door on Consumer Antitrust Standing*, 54 N.Y.U. L.Rev. 237 n.6 (1979); and the cases and authorities cited therein.

provision of the Clayton Act was intended by Congress primarily as a remedy for individuals, "especially consumers."

Second, as this Court unanimously ruled in *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), a "consumer whose money has been diminished by reason of an antitrust violation has been injured 'in his . . . property' within the meaning of Section 4" of the Clayton Act, even if the consumer has suffered no "business" or "commercial" injury.

Third, as commentators and this Court have acknowledged after reviewing the legislative histories of the Sherman and Clayton Acts, the "private treble-damages remedy was enacted to achieve two great public purposes: compensation for private harm and enforcement of the national economic policy in favor of competition." Berger and Bernstein, *supra* note 51, at 845.[52]

Both of these Congressional objectives would be furthered by allowing consumer standing in the circumstances of this case. And because the injuries to psychologists and to consumers of psychological services are quite distinct, the first objective—compensation for private harm—can be furthered *only* by allowing consumer standing.

Petitioners contend that since psychologists do have standing to assert antitrust claims against them, granting standing to consumers "advances no rational goal of the antitrust laws," Cert. Pet. at 20, and "the policies of

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[52] *See also, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 485-486 (". . . the treble-damages provision . . . is designed primarily as a remedy."); *Reiter v. Sonotone Corp.*, 442 U.S. at 344 ("Congress created the treble-damages remedy of Section 4 precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limted resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.") (emphasis in original).

the antitrust laws can be fully vindicated" by psychologists. Cert. Pet. at 9. But that contention overlooks the very different economic injuries which psychologists and consumers of psychological services suffer by reason of the same antitrust violation. The economic injury to psychologists consists of the income they would have received from potential clients who would have chosen their services but who chose instead the services of psychiatrists in order to obtain reimbursement from petitioners. If, as in this case, a client nevertheless chooses and pays a psychologist, the psychologist will have "suffered no damage in this respect," because the consumer will have "already paid" the psychologist in full. *McCready v. Blue Shield of Va.*, 649 F.2d 228, 232 (4th Cir. 1981). The only economic injury, in this circumstance, is to the consumer.[53] Accordingly, unless consumers who do choose psychologists are granted standing to sue for the particular economic injury they and they alone suffer by reason of the antitrust violation, the Congressional objective of ensuring compensation for every private harm will be completely frustrated.

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[53] Petitioners stress that "there is no allegation in the complaint that the alleged boycott increased the price of clinical psychologists' services or that the alleged boycott hindered McCready in finding a clinical psychologist to treat her." Cert. Pet. at 4. Both of those points are irrelevant. But for the antitrust violation, respondent would have been reimbursed for 80 percent of the cost of her psychologist's services. McCready Deposition Transcript at 67; *McCready v. Blue Shield of Va.*, 649 F.2d at 231. Thus, even if the violation did not increase the gross cost of psychological services, it very substantially increased respondent's *net* or out-of-pocket cost, and substantially diminished the money she would have had but for the violation. Similarly, the fact that respondent was able to purchase the services of a psychologist, although at an increased cost to her, is no more relevant than the fact that the plaintiffs in *Reiter v. Sonotone Corp.*, 442 U.S. 330, were able to purchase hearing aids, although at an increased cost to them. The fact that goods or services are available at *some* price does not preclude suit under the antitrust laws if, because of an antitrust violation, the cost of those goods or services to the consumer is increased.

In addition to furthering this nation's economic objectives, granting standing to consumers of psychological services will further other equally important societal objectives. As we have demonstrated above, there is an enormous and unmet need for psychological services in this country. 1 PRESIDENT'S COMMISSION REPORT 2-10; *see generally* discussion *supra* at 5-7. Increasing the pool of therapists available to meet that need will directly and substantially benefit individuals, and will indirectly benefit the national economy by reducing the time employees are absent from work because of psychological problems.

In sum, recognition of respondent's standing in this case will further important societal objectives as well as the purposes of our anti-trust laws, "the essence of [which] is to ensure fair price competition in an open market." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979).

B. In the Circumstances of This Case, Standing Will Not Result in Duplication of Recovery, Speculative Damages, or any of the Other Problems Which Have Persuaded Courts, in Other Circumstances, to Deny Standing [54]

Petitioners contend that "this case presents exactly the situation of multiple lawsuits against the same defend-

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[54] Although respondent will discuss the cases relied upon by petitioners in more detail, *amicus* simply wishes to state that all of the cases cited by petitioners in support of their argument that respondent should be denied standing are readily distinguishable. Indeed, some of them are not "standing" cases at all. For example, petitioners assert that the "standing" principle of *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972), "was elaborated" in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Cert. Pet. at 16. But in *Illinois Brick* this Court expressly did "not address the standing issue . . ." 431 U.S. at 728 n.7. Rather, the Court "stressed the difficulties of proving passing-on of overcharges in the course of holding that indirect purchasers could not recover treble damages under Section 4." Berger and Bernstein, *supra* note 51, at 855. The "direct-purchaser rule of *Illinois Brick*," as this Court phrased it in *Reiter v. Sonotone Corp.*, 442 U.S. at 337 n.3, is thus a substantive rule fashioned to

ants that the 'target area' rule was designed to prevent." Cert. Pet. at 9. But since the economic injuries to psychologists and consumers are quite distinct, granting standing to both will not result in "multiple" or "duplicative recoveries," which was the "central premise" and reason for denying standing in *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979).

The economic injuries suffered by consumers are not at all speculative. They are fixed by the terms of their Blue Shield contracts, and "can be readily ascertained to the penny." *McCready v. Blue Shield of Va.*, 649 F.2d 228, 231 (4th Cir. 1981).

Petitioners also assert that respondent should "not be accorded standing, because her alleged 'injury' results from the independent decision of her employer to purchase a group contract that did not cover psychologists' services." Cert. Pet. at 17; *see also, Id.* at 20. That assertion is irrelevant, and seriously misleading, in several respects. First, if it were true that respondent's injury was caused not by petitioners but solely by her employer, that factual issue could not be resolved on standing grounds, but only on the merits. Second, the assertion is not factually accurate. "Between 1962 and 1972, Richmond Plan coverage included direct payment to psychologists for psychotherapy rendered to subscribers." *Virginia Academy of Clinical Psychologists v. Blue Shield of Va.*, 624 F.2d 476, 478 (4th Cir. 1980). In 1972, petitioners decided, apparently without changing the wording of the plans, to re-interpret the plans so that payment would be allowed for the services of psychologists only if those services were billed through a physician. *Id.* But in 1973, Virginia enacted a statute

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avoid the special and complex problems of proof of damages in chain-of-distribution cases. But none of those proof problems is present in the circumstances of this case, and *Illinois Brick* is therefore irrelevant on substantive grounds, as well as on the issue of standing.

which *required* the plans "to pay directly for services rendered by licensed psychologists." *Id.*[55]

As petitioners know, respondent sues on her own behalf and on behalf of a not yet certified class of consumers who incurred unreimbursed costs for services by licensed clinical psychologists "since 1973." Cert. Pet. at 3; *McCready v. Blue Shield of Va.*, 649 F.2d 228, 229 (4th Cir. 1981). Thus, at all times relevant to this suit, state law required petitioners to reimburse directly for services rendered by psychologists. Given this history of direct reimbursement and a state law requiring direct reimbursement in 1973 and thereafter, it was certainly not unreasonable for respondent's employer to believe that it had contracted for a plan which would provide direct reimbursement.[56]

Petitioners contend that the "target area" rule "was rejected by the majority" below, and they stress that point repeatedly. Cert. Pet. at 7-8; *see also Id.* at 10-19. *Amicus* is puzzled by that contention. Far from "rejecting" the rule, the majority squarely held that both psychologists and consumers "were in the target area." *McCready v. Blue Shield of Va.*, 649 F.2d 228, 231 (4th Cir. 1981). Moreover, in explaining its ruling, the majority indicated that the target area rule should be applied to deny standing "only when the underlying purposes of the phrase are served"; surely petitioners do not quarrel with that qualification. Petitioners may disagree with the majority whether the target area rule permits or prohibits standing in the particular factual circumstances presented by this case; but to suggest that the majority below rejected the target area rule as a matter of law, thus creating a supposed conflict with

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[55] Va. Code § 32-195.10:1 (now amended and codified at § 38.1-824 (1978)).

[56] Of course state law did not preclude petitioners from raising the cost of the plans they offered, if they had chosen to do so.

other circuits, is disingenuous. Because there is no true conflict between the decision below and other circuits on this point, it would be appropriate to dismiss the writ of *certiorari* as improvidently granted on that question.[57]

CONCLUSION

The writ of *certiorari* should be dismissed; or, in the alternative, the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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[57] The remaining question raised by petitioners was resolved against them in the related case of *Virginia Academy of Clinical Psychologists v. Blue Shield of Va.*, 624 F.2d 476 (4th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981). As petitioners note, that case involved "a similar complaint" "filed in the same court against the same defendants . . . . The material allegations in the two complaints are identical." Cert. Pet. at 8-9. In that case, as in this, petitioners contended unsuccessfully that their plans were exempt from the antitrust laws as part of the "business of insurance" under Section 2 of the McCarran-Ferguson Act. Petitioners were represented by the same lawyers, for the most part, in both cases. In our view, petitioners are collaterally estopped from attempting here to relitigate that issue. Accordingly, the writ should be dismissed as improvidently granted on that question as well.

CERTIFICATE OF SERVICE

I, Paul R. Friedman, Counsel for *Amicus Curiae* and a member of the bar of this Court, certify that on January 18, 1982, I served by mail three copies of the foregoing Motion for Leave to File Brief *Amicus Curiae* and Brief of *Amicus Curiae* on Griffin B. Bell, Esquire, King & Spalding, 1915 I Street, N.W., Washington, D.C. 20006, Counsel of Record for Petitioner; and on Timothy J. Bloomfield, Esquire, Dunnells, Duvall, Bennett & Porter, 1220 19th Street, N.W., Washington, D.C. 20036, Counsel of Record for Respondent.

PAUL R. FRIEDMAN